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# QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, INCLUDING POLICIES OF RACIAL DISCRIMINATION AND SEGREGATION, IN ALL COUNTRIES, WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES: REPORT OF THE SUB-COMMISSION UNDER COMMISSION ON HUMAN RIGHTS RESOLUTION 8 (XXIII)

## Note verbale dated 29 June 2000 from the Permanent Mission of Belarus to the United Nations Office at Geneva addressed to the Office of the High Commissioner for Human Rights

The Permanent Mission of the Republic of Belarus to the United Nations Office and other International Organizations at Geneva presents its compliments to the Office of the United Nations High Commissioner for Human Rights and has the honour to transmit herewith the text of the report* of the Government of Belarus prepared pursuant to the Chairperson's statement made on 20 August 1999 at the fifty-first session of the Sub-Commission on the Promotion and Protection of Human Rights.

* The report contained in the annex is reproduced as received in the language of submission, and in English only.

Annex

# REPORT

## ON LEGISLATION GOVERNING AND PROTECTING THE OBSERVANCE OF HUMAN RIGHTS IN THE REPUBLIC OF BELARUS

## GENERAL

Citizens' rights, freedoms and obligations in all the main spheres of life (socio-economic, political and private) define their legal position in society, and thus their legal status. The latter is the criterion of the policy of a genuinely democratic, rule-of-law State.

The objectives of the Belarusian Government's human rights policy are to define and implement integrated measures to ensure the effective protection of citizens' rights and freedoms during the transition to a civil society.

Article 2 of the Constitution of the Republic of Belarus embodies the country's most important constitutional principle, namely that the primacy of the individual and of his rights and freedoms, together with guarantees for their realization, constitute the State's highest value and objective. That is the basis for the formation of civil society in Belarus.

Measures relating to the law are now being given priority in the efforts to ensure the requisite level of protection of citizens' rights and freedoms. The country is also pursuing measures in the socio-economic, material and organizational spheres with this same aim of strengthening the institution of citizens' rights and freedoms.

### The main means of improving the machinery for the safeguarding of citizens' constitutional rights and freedoms

Belarus now has a modernized corpus of laws that provides a constructive foundation for the further development of citizens' rights and freedoms. The chief components of that corpus are: the Constitution, adopted as amended by national referendum in 1996; the country's principal laws, including the new codes; various decrees and edicts of the President of the Republic, Government decisions and other legislative instruments adopted in recent years, as well as departmental and local regulations, which have recently been substantially revised.

The universally recognized principles of international law and the rules of international treaties to which Belarus is a party form part of the law in force in Belarus and, therefore, of the body of rules governing citizens' rights and freedoms.

In shaping the law that provides for citizens' rights and freedoms and for their realization and protection, Belarus accords a large place to the principles and rules laid down in international instruments. It is no accident that the Constitution states that Belarus acknowledges the primacy of the universally recognized principles of international law and will ensure that its own legislation complies with them (art. 8).

The most important and comprehensive of the international human rights instruments, one that unites national and international efforts to promote and protect human rights and fundamental freedoms, is the International Bill of Human Rights. It comprises the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Economic, Social and Cultural Rights and the 1966 International Covenant on Civil and Political Rights and the Optional Protocol thereto. All of these instruments have now entered into force for Belarus, which has either ratified them or acceded to them. The International Bill of Human Rights reflects the world's peoples' common understanding about inalienable and indestructible human rights and it is compulsory for all members of the international community to bring their domestic legislation into line with the international rules and standards in it. The general provisions and principles and the specific rights and freedoms in all spheres of human life set forth in the Bill are benchmarks.

In developing and improving its domestic law, Belarus, as a full member of the international community, consistently pursues a policy of comprehensive respect for human rights and freedoms and compliance with the relevant international rules. The most important international principles and rules have been embodied in Belarusian law (primarily in the Constitution and other laws).

Belarus is a party to a number of universal international human rights treaties, chief among them the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (entry into force for Belarus: 1954), the 1952 Convention on the Political Rights of Women (entry into force for Belarus: 1954), the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (entry into force for Belarus: 1976), the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* (entry into force for Belarus: 1976), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (entry into force for Belarus: 1981), the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entry into force for Belarus: 1987), the 1989 Convention on the Rights of the Child (entry into force for Belarus: 1990), the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (entry into force for Belarus: 1970), and the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (entry into force for Belarus: 1998).

Belarusian law regarding the establishment and protection of human rights and freedoms has now been brought substantially closer to the relevant international standards.

Many provisions of the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, the 1966 International Covenant on Civil and Political Rights and other international human rights instruments have been embodied in the Constitution or other parts of Belarusian law. The treatment accorded to human rights and freedoms in the Constitution is new, reflecting a closer alignment with international guidelines and standards.

A rule-of-law State would be unthinkable without firm guarantees of the genuine exercise of the universally recognized human rights and fundamental freedoms. Consequently, the creation of a State where a truly fair legal system prevails presupposes the adoption not only of

laws providing for personal rights and freedoms and their precise application but also of laws ensuring that citizens have the requisite information regarding their rights and the laws and institutions that exist to protect them, and the possibility of easy and free access to the relevant bodies, especially the courts, for the protection of their rights and freedoms against all breaches.

The Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December 1948 provides, in article 8, that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

The International Covenant on Civil and Political Rights stipulates, in article 2, paragraph 3, that States must ensure that everyone whose rights or freedoms are violated has an effective remedy, that the right to such remedy is determined by competent judicial, administrative or legal authorities, or by any other competent authority provided for by the legal system of the State concerned, and that they must develop the possibilities of judicial remedy.

Hence, international legal instruments guide States towards the provision in domestic law of the possibility of protection of human rights and freedoms in competent national organs, priority being given in this respect to the judicial protection of citizens' rights and freedoms.

Belarusian law provides for the comprehensive protection of citizens' rights and freedoms, including in judicial organs.

Under article 59 of the Constitution, State organs, officials and other persons entrusted with the execution of State functions are obliged to take, within the limits of their competence, the requisite measures for the exercise and protection of the rights and freedoms of the individual.

Article 60 of the Constitution guarantees every citizen the protection of his rights and freedoms by a competent, independent and impartial court of law within the time-limits specified by law. For the purposes of defending their rights, freedoms, honour and dignity, citizens are entitled by law to seek through the courts redress for property damage and material compensation for moral injury.

The above constitutional rules establish the principles for relations between the State and the individual and give priority to the latter's interests.

Belarus has recently adopted a number of very important legislative instruments in the sphere of adjective law: the Code of Civil Procedure, the Code of Criminal Procedure and the Marriage and Family Code. These instruments make possible the full protection before the courts of the rights and legal interests guaranteed to citizens by the Constitution.

The judiciary in Belarus is independent and of equal status with the executive branch and the legislature. The judiciary safeguards the rights and freedoms of citizens of the Republic.

The principles of the organization and activity of the judiciary are laid down in the Constitution, the Judicial System and Status of Judges Act and the various codes of Procedure.

(1) The separation of the judiciary, legislature and executive and the administration of justice solely by the courts;

(2) The principle that judges are independent and subject only to the law;

(3) The principle that justice is administered on the basis of citizens' equality before the law and the courts;

(4) The principle of compliance with the law in the administration of justice;

(5) The public nature of judicial proceedings;

(6) The principle of adversariality and of equality of the parties in the administration of justice;

(7) The right of citizens to protection by the courts.

Every citizen is entitled to turn to the courts for the protection of his rights, freedoms, honour or dignity and to seek redress through the courts both for material damage and for moral injury.

Pursuant to article 62 of the Constitution, every citizen has the right to legal assistance for the exercise and protection of his rights and freedoms, including the right to have at any time the assistance of lawyers or other representatives in courts. In the instances provided for by law, citizens may be given legal assistance at the State's expense.

Opposition to the provision of legal assistance is prohibited.

Of great importance in criminal cases is the securing to the suspect or accused of the right of defence at all stages of the proceedings.

The application of the principle of securing the said right of defence presupposes an obligation on courts, procurators and persons conducting a pre-trial investigation or an initial inquiry to explain the suspect's or accused's legal rights to him during the proceedings and to take measures to ensure that he has a genuine possibility of using all the means provided by law for defending himself against a charge, including the assistance of a lawyer.

It is a requirement of article 25 of the Constitution that persons being held in custody be given the right of judicial verification of the lawfulness of their detention or arrest.

The securing to the suspect or accused of the right of defence is not only a reliable guarantee of protection for personal rights and freedoms in criminal proceedings, but also a necessary condition for the proper administration of justice.

Human rights and freedoms are also protected by the Constitutional Court, which article 116 of the Constitution makes responsible for verifying the constitutionality of enforceable enactments.

Enforceable enactments or, as the case may be, provisions thereof which the Constitutional Court finds to be unconstitutional are null and void. In many instances, such unconstitutional instruments have violated rights and freedoms which the Constitutional Court has deemed to be entitled to protection. The Constitutional Court's rulings are of great importance in guaranteeing the constitutionality of legislation, law and order and the protection of human rights and freedoms.

The procedure and conditions for the restriction or suspension of personal rights and freedoms are dealt with in articles 23 and 63 of the Constitution. It is noteworthy that, pursuant to those articles, such restriction or suspension is only permissible when provided for by law. In Belarusian law, the objects of the special measures this entails are narrower than in international legal instruments, including the International Covenants.

The concrete scope of Belarusian citizens' rights and freedoms is determined by a number of objective factors characteristic of the present state of society. Consequently, the most promising way of developing that scope in the near future is to ensure not only that the individual has a high legal status, but also that that status is sufficiently stable and that citizens are clear and certain about the scope and content of their rights and freedoms and, above all, about the possibilities for their practical use and protection in the socio-economic conditions that obtain in the country. The achievement of social harmony, the consolidation of society and the guaranteeing of the requisite scope of citizens' rights and freedoms constitute a far from easy task, but one that cannot be dispensed with in a society whose aims are the building of a democratic, rule-of-law State and the occupation of its due place in the world legal community. Fulfilling that task requires the creation of strong machinery for the social and legal protection of rights and freedoms that is based on a package of mutually-agreed socio-economic, organizational, social-psychology and legal measures aimed at linking, coordinating and optimizing the manifold activities of the State and the many components of its political system.

Currently, the changes in the legal status of the individual concern principally the group of citizens' political and, above all, socio-economic rights and freedoms. That is so because of the changes in the country's political system and economy and of the coverage in law of new forms of ownership. Together with the emergence of new economic rights (private property ownership, freedom to engage in business, etc.) that are equal for all, there has been a substantial narrowing of the basis for the realization of a number of social rights (to labour, housing, leisure time, etc.). The State is striving to protect the disadvantaged strata of the population through the realization of the right to a decent existence. In this connection, there is currently a large number of special legal statuses for the population groups least well protected during the period of economic reform.

Nowadays political rights are being realized through the concurrent existence within society of a variety of political tendencies and ideas, through political pluralism and the presence

of a multi-party system, etc. Problems do, however, occur in this regard, because, for example, the country has no firm tradition of political pluralism and people's political literacy and sense of justice are still inadequate.

The realization of rights and freedoms requires not only the securing to the citizen of specific rights, but also the actual receipt by him of the benefits that constitute the content of those rights. Hence, if citizens are to be able to realize them, their rights and freedoms must be soundly guaranteed.

The State constitutes the political guarantee of citizens' rights and freedoms. The Constitution proclaims Belarus to be a social, democratic State based on the rule of law (art. 1) that guarantees its citizens their rights and freedoms and whose supreme goal is the safeguarding of those rights (art. 21).

The building and development of a rule-of-law State necessitates the creation and operation within the country of civil society. In turn, the formation of civil society is impossible without a rule-of-law State. From this it may be concluded that the consolidation of civil society will be possible only with the support of the State. It is precisely now, when the country is going through the difficulties of transition, emergence of a new political and economic system and combating of a crisis, that attention needs to be given to the development and democratization of State institutions.

Thus, the building of a rule-of-law State requires the reform of the entire legal system with a view to the construction of a society having citizens' rights and freedoms as its basic values. Such reform is impossible without strengthening the role of the law by means of the careful crafting of a genuinely functional legal apparatus and the elaboration, on the basis of theory, experience and practice, of legal guidelines meeting the needs of our emergent sovereign State.

The persistent and gradual reform of the Ministry of Justice through the expansion of its functions is an integral part of the State's policy in the sphere of justice and will further the safeguarding of the rights and lawful interests of the Republic of Belarus, citizens and legal persons as well as the improvement of court procedures and the application of judicial decisions.

As a rule-of-law State, Belarus is still in the process of formation. How consistent that process is and when it will be completed will depend to a large degree on the Government. The development of the political situation in independent, post-Soviet Belarus has been such that the Government has emerged as a more active, influential force in the "authorities/society" system - and, being legitimate, stable, strong and law-abiding, it is able to pursue reforms in various spheres (particularly the economy) whose effect is a radical improvement in the situation as regards the guarantees of human rights and citizens' rights.

Feedback from society - feedback about its problems in general and feedback from individuals - is of great importance in this respect. Accordingly, article 40 of the Constitution guarantees everyone the right to submit personal or collective appeals to State organs. Those organs, and persons occupying official functions, are obliged to examine such appeals and reply on their substance within time-limits set by law. All refusals to examine citizens' appeals must

be justified in writing. Development of the legal machinery for the effective guaranteeing of citizens' rights and freedoms is an ongoing concern of Belarusian legal theorists and practitioners.

## Fulfilment of undertakings to the Sub-Commission on the Promotion and Protection of Human Rights

Belarus attaches great importance to cooperation with United Nations human rights bodies and is open to constructive dialogue.

Throughout its history as an independent State there has never been an instance in which representatives of the United Nations human rights bodies have been denied the right to visit Belarus. Indeed, the United Nations High Commissioner for Human Rights, Mrs. Mary Robinson, has been invited to visit the country.

The Ministry of Foreign Affairs has produced and submitted to Parliament a bill that would withdraw the reservations to article 20 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. We are pleased to report that the bill has been favourably received by the Parliamentary commissions on international relations and on human rights, which have recommended its adoption.

The bill was considered in plenary by the House of Representatives of the National Assembly of the Republic on 22 June 2000. After discussion, it was adopted with 68 votes in favour. None of the deputies present voted against the bill.

In conformity with constitutional procedure, the bill, having been approved by the House of Representatives, has been forwarded for consideration to the Council of the Republic in the National Assembly. After confirmation there it will be signed by the President within ten days.

A bill to establish a human rights attorney (ombudsman) in Belarus has been drafted by the National Centre for Legislative Activity operating under the authority of the President, in cooperation with all interested executive, legislative and judicial bodies. The aim is to create an organ that meets the high standards of the United Nations relating to national human rights institutions. The drafting of this bill featured in the Presidential Edict on legislative activity in the year 2000.

The bill is now completely ready. Unfortunately, the current session of Parliament is the last. Elections for a new House of Representatives are scheduled for October 2000. A central topic at the last session was, thus, the drafting and adoption of an Electoral Code meeting international standards. This process is advancing in close cooperation with, and with due regard for the comments by, OSCE and the Council of Europe. It has, however, significantly reduced the number of other bills under consideration in Parliament. The Ministry of Foreign Affairs is nevertheless determined to ask the National Assembly to consider the bill.

Early admission of Belarus to the Council of Europe has never been off the agenda of the Belarusian leadership. Joining the Council is an absolute priority in our relations with the

European institutions. We are aware that membership of the Council of Europe requires accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Studying that Convention and compiling an inventory of Belarusian legislation and law-enforcement practice with a view to checking their consistency with the Convention are two items on the draft National Programme of Action for the promotion and protection of civil rights during the creation of a civil society in Belarus.

Work on the draft National Programme of Action was completed in the spring of 2000. The Programme was drafted by the Government on instructions from Parliament and is now before the President for consideration. One of the most important items in the Programme is bringing Belarusian legislation and law-enforcement practice into line with the country's international obligations as regards, among other matters, the administration of justice. We hope that its application will make a significant contribution to the exercise and protection of Belarusian citizens' rights.

Dialogue between political and social forces

The Belarusian leadership is striving to maintain the social harmony that has always been a beneficial feature of our country. The launching in 1999 of consultations between the Government and political and social circles in Belarus was the logical continuation of these efforts. The format of these consultations was, however, unjustifiably constrained, and did not reflect the genuine disposition of forces within society. A whole range of political parties and non-governmental organizations representing 80-90 per cent of civil society were left out of the consultation process. Many parties and NGOs thus entertained quite reasonable doubts about attending the consultations. It was for this reason that, in February 2000, the President of the Republic proposed a wide-ranging dialogue within Belarus in which all social and political forces would take part.

The entities taking part in the dialogue of social and political forces (110 Belarusian social and political organizations of various persuasions, including 11 political parties) that began on 29 March 2000 have expressed their support for it, regarding it as a unique opportunity to tackle the problems confronting Belarusian society in a civilised fashion. Another aim of the dialogue is to make the preparations for the forthcoming elections as "transparent" as possible.

Six expert groups have been set up and are working successfully under the auspices of the group that inaugurated the dialogue. The members of those groups have been discussing the most topical issues facing Belarusian society, among them the amendment of the Electoral Code, and drawing up proposals for adoption in subsequent plenary sessions.

A plenary session of the dialogue held on 30 May 2000 was attended by the President of the Republic in person. The direct involvement of the Head of State was prompted by his desire to make the dialogue process more dynamic and results-oriented.

The President spoke out unambiguously in favour of continued dialogue as the only acceptable means of reaching national consensus, and confirmed his willingness to attend sessions of the dialogue in person in order to discuss the most vital aspects of social development.

Information on the progress of the dialogue and preparations for the elections is made available over the Internet and may be consulted at the following addresses:

http://www.president.gov.by/rus/dialog/ and http://www.president.gov.by/cec/

The Belarusian leadership is prepared to help in any way it can to promote the wide-ranging dialogue among the social and political forces in the country which was launched on 29 March 2000.

The format of the dialogue, involving the Government, political parties and NGOs, fully meets the requirements of the current state of development of civil society in Belarus and is consistent with Belarus' obligations as laid down in the Declaration of the OSCE Istanbul summit (November 1999). The current Constitution and laws of the Republic serve as the basis for discussion. Any matter, including amendments to current legislation, can be raised and discussed. Such amendments can and must, however, be proposed, as procedure requires, within the current legal framework - as is being done in the case of the Electoral Code.

All social and political groups and movements, including those which for various reasons have hitherto not attended the plenary sessions of the dialogue, have the possibility of taking part in the work of the expert groups.

Individual parties and politicians who consciously exclude themselves from the dialogue process are thereby standing aside from a civilised and honourable political process that embraces all Belarusian society. That they deliberately ignore the dialogue testifies first and foremost to their lack of confidence in their own potential and their determination to boycott the elections. It is our firm opinion that democratic elections should not be held hostage to the dealings of a small group of politicians pursuing their own interests.

The Republic of Belarus is open to constructive cooperation in the course of the dialogue with all interested international organizations, notably OSCE through its Advisory and Monitoring Group in Belarus.

The President of the Republic joined the process in person on 30 March 2000 in order to ensure that the dialogue resulted in proposals for the constructive amendment of Belarusian electoral law and the holding of free and democratic parliamentary elections.

Drafting and adoption of the Electoral Code

One of the most vital requirements for the observance of human rights and freedoms is to ensure that the forthcoming parliamentary elections are democratic. A prerequisite for this is the adoption of an electoral law that meets international standards.

Belarus has drawn up and adopted a new Electoral Code in close collaboration with leading European organizations. In particular, the draft Code was sent in the summer of 1999 to OSCE and the Council of Europe for legal appraisal, and to all political parties and movements in Belarus for comments and suggestions.

During its discussion in Parliament, 61 separate amendments were made to a total of 59 articles in the draft Code. In its final version the Code takes account of most of the comments made by the OSCE Advisory and Monitoring Group in Belarus. The only exceptions were those that contradicted the Belarusian Constitution or related to topics not covered by the Code. It may thus be confidently stated that we are ready to hold parliamentary elections on the basis of electoral law that meets international standards.

The experts on the Council of Europe's Commission for Democracy through Law (Venice Commission) had already stated that the initial draft of the Code was entirely suitable for the conduct of sufficiently fair elections.

The Belarusian opposition put forward its suggestions only at the last stage, and then only through the OSCE Advisory and Monitoring Group in Belarus. Even so, some of these proposals were taken into account by the National Assembly during the passage of the Electoral Code.

The OSCE Office for Democratic Institutions and Human Rights (ODIHR) also made an expert analysis of the draft Electoral Code. Although its analysis is dated 20 January 2000, however, it was based on the initial session of the draft without a single correction. The ODIHR analysis is obviously politicized, prejudiced and contrived, abounding in deliberate distortions of what the Belarusian Constitution and the Electoral Code itself say.

The text of the Electoral Code as adopted has been sent to leading European institutions for a further evaluation of its consistency with democratic standards.

It is our firm belief that the Electoral Code adopted by the Republic of Belarus is a significant improvement on the Belarusian Supreme Soviet (Elections) Act under which the members of the Supreme Soviet of the thirteenth convocation were elected, and that Act was itself acknowledged to be on the whole in conformity with European standards. The political parties, public organizations and trade unions participating in the dialogue of social political forces paid careful attention to the conformity of the Code to democratic standards and the emendation of individual provisions. They drew up a range of proposed emendations to the Code, inter alia regulating the rights of national and international observers, expanding the membership of the electoral commissions to include more representatives of political parties and public entities and lowering the turnout requirements for the first round of voting. These proposals were placed by the President of the Republic before the National Assembly for consideration, and have now been approved by the lower house of Parliament.

Work in the dialogue machinery continues. The political parties and public organizations taking part are now considering means of improving the legislation governing the mass media and the freedom of political gatherings, marches, demonstrations and other mass events in Belarus.

Comparative analysis of the Electoral Code and the old Elections Act

A number of substantial changes making the electoral campaign process more democratic have been introduced into the Electoral Code, in conformity with the Constitution, by comparison with the old Supreme Soviet (Elections) Act.

The Code now incorporates an article 11 reflecting one of the important principles to be observed in elections, including elections of members to the House of Representatives in the Republic of Belarus. This lays down the organizational principles governing the conduct of elections by electoral commissions, the composition of those commissions (representatives of political parties, other public entities, labour collectives and representatives of the general public), and their supervisory authority. Their independence from State bodies and local authorities is carefully delimited, as is the obligation of all bodies, public entities, businesses, institutions, organizations and citizens to comply with decisions handed down by the electoral commissions within the limits of their jurisdiction.

Article 6 of the Act only states that elections to the Supreme Soviet shall be conducted by electoral commissions, whose composition it dictates.

Changes have been made to the way in which elections are called. At present both regular and special elections to the House of Representatives in the National Assembly (Parliament) are called by the President of the Republic. He as the Head of State also determines the organizational arrangements under which elections will be held. Under the old Act, elections to Parliament were called by the Supreme Soviet itself three months before the expiry of its term of office.

Under the Code as under the Act, responsibility for the conduct of electoral campaigns is vested in the electoral commissions - central, district and constituency-level. At the same time, there are a range of differences in the commissions' composition and jurisdiction.

In keeping with the amended Constitution, the principle whereby the Central Commission on Elections and Republic-wide Referendums is constituted has been changed. From a body which under the Act was constituted by and entirely subordinate to Parliament, it has been transformed into an independent body constituted on an equal footing by the President of the Republic and the Council of the Republic on the basis of joint submissions by the Presidiums of the oblast-level and City of Minsk councils of deputies and by the oblast-level and City of Minsk executive committees. Thus the Head of State and members of the representative and executive branches of power all have a say in the constitution of the Central Commission, and this ensures that they cooperate in carrying out one of the most important functions in the State.

The Central Commission is an independent body not bound by the decisions of political parties or other public entities; this is stated in so many words in the special Act governing its constitution and activities. The Act also contains a provision forbidding members of the Central Commission to participate in the activities of political parties or accept instructions from them. There are restrictions on the kinds of people who may become members (candidates for the presidency of the Republic or seats in the House of Representatives and their attorneys,

candidates for the Council of the Republic, members of the House of Representatives and Council of the Republic, and other persons in the instances provided for by legislation are excluded). Account is taken of all these provisions in the Code.

To ensure that the Central Commission can carry out its complex tasks and take legal, well-founded decisions, its members have to meet high professional requirements: as a rule they must have a university-level legal education and experience in the organization and conduct of elections and referendums.

The Code is more thorough and detailed than the Act on the subject of the jurisdiction of the Central Commission over the arrangements for the conduct of elections, the direction of the activities of the electoral commissions, the conduct of elections beyond the borders of the Republic, financing and the allocation and disbursement of resources during elections, and the monitoring of compliance with, and submission of proposed amendments to, the law.

The fact that the Central Commission is required to ensure that political parties, other public entities and candidates are afforded equal legal conditions for their pre-election activities, and that it does not have the right to take final decisions on applications and complaints against the decisions and actions of the electoral commissions, whereas provision is made for such applications to be heard by the courts, is another important safeguard of democratic principles. It should be noted that the Central Commission has jurisdiction to establish and develop contacts with bodies in other States and international organizations concerned with the conduct of elections and referendums. Thus it is able to take better account of international experience in the conduct of electoral campaigns in democratic countries.

Compared with the Act, the Code is more thorough and detailed on the substance of and compliance with the principle of disclosure in the preparations for and conduct of elections. Article 13 of the Code gives a list of the people who are required to monitor the entire course of the electoral campaign under a procedure established by the Central Commission, and specifies which State body can invite observers from foreign States and international organizations, who are accorded the same rights as other observers (representatives of State bodies, political parties, other public entities, labour collectives, individual citizens and the mass media), to Belarus. It also more clearly regulates the participation of observers at all stages of the electoral process.

The Code changes the number of electoral constituencies and procedure for their definition. They are defined by the Central Commission on submission from the oblast-level and Minsk executive committees (as under the Act, the oblast-level and City of Minsk councils of deputies play no part). The constituencies have been enlarged and their number reduced from 260 to 110. At the same time it has been made a requirement that constituencies should contain roughly equal numbers of voters. Variations of more than 10 per cent are not permitted, and this has been made the single criterion for compliance with the requirement. The Act had general provisions to the effect that constituencies for the purpose of elections to the Supreme Soviet were to be defined in Belarus with approximately equal numbers of voters, account being taken of the administrative and geographical divisions within the Republic. Moreover, the Code specifies that each constituency must consist of a single geographical unit and that the formation of constituencies out of non-contiguous areas is not permitted.

Unlike the Act, the Code offers judicial protection for members of an electoral commission whose authority is prematurely terminated by the body that constituted it. The courts are required to hear complaints on this subject and hand down decisions, which are regarded as final, within a specified period.

The Code offers broader opportunities to appeal against irregularities in electoral lists not only to the courts but also to the next higher electoral commission.

Under the Code, a group gathering signatures in support of the nomination of a candidate for the House of Representatives may, if the next higher electoral commission refuses to register the nomination, appeal to the courts.

The Code devotes greater attention than the Act to the procedure whereby candidates for elected posts may be nominated by support groups gathering signatures (compilation of lists, submission of lists of signatures to the electoral commissions, verification of the authenticity of the details given in those lists, grounds for declaring lists of signatures spurious), this being an important aspect of the legitimacy of elections. It establishes a minimum threshold (20 per cent) for the number of voters' signatures that must be checked by the district and electoral commissions, and clear qualitative criteria for finding signatures invalid. If, however, spurious signatures are found only they, not the lists containing them, are excluded from the count. This is of significance in decisions to register or refuse to register candidates for elected posts.

There is a special article in the Code, article 73, plainly setting forth the democratic requirement that all candidates for the presidency of the Republic and for elected posts must have equal rights and obligations and forbidding candidates to take advantage of the privileges of their official positions to further their election. It also indicates what is meant by those privileges. A breach of that requirement is grounds for refusing to register a candidate or for annulling his registration.

Article 47 of the Code seeks to prevent abuse of the right to engage in pre-election canvassing. It lays down specific requirements for the content of canvassing material, which must contain no propaganda for war, no calls for the violent overflow of the constitutional order or violation of the territorial integrity of the Republic, and nothing defamatory or libellous to public officials or candidates for the presidency or elected posts. Canvassing and propaganda based on social, racial, national, religious or linguistic superiority, and the utterance and distribution of messages and materials fomenting social, racial, national or religious hatred, are prohibited.

Of great importance to the conduct of the elections is the second part of the same article which forbids candidates for elected posts, their attorneys, and organizations and individuals canvassing for the election of candidates to take any action that might affect voters or their voting intentions (distribution of money or gifts, other physical assets, provision of any services or goods free of charge etc.). In the event of a breach of this requirement, the electoral commissions may take action to put a stop to the abuses or even annul the candidate's registration.

A special section of the Code, chapter 12, deals with liability in the event of breaches of the law during electoral campaigns. It provides for a wide range of measures (administrative or criminal proceedings, annulment of a candidate's registration, provision of candidates with an opportunity publicly to refute false information spread about them, referral in contentious cases to the electoral commissions, the Office of the State Prosecutor or the courts) that can be applied to those responsible.

One important requirement for fair elections is the establishment of proper financing arrangements guaranteeing candidates for elected posts equal opportunities during their electoral campaigns. For this reason, the Code contains a separate article, article 48, defining the sources from which monetary resources may be obtained and how those resources may be disbursed and used by candidates for elected posts. Electoral campaigns may be financed only with funds from the State budget or out of monies contributed by Belarusian organizations, public entities and citizens and placed in an extrabudgetary fund established by the Central Commission. These funds must be distributed equally among candidates and used under the supervision of the Central Commission, which is required to report to the House of Representatives on how the resources from the State budget have been disbursed, and to publish accounts of the disbursement of monies from the extrabudgetary fund.

The Code has reduced from 50 to 25 per cent the voter turnout threshold above which ballots for members of the House of Representatives are deemed valid in the second round of voting.

It must in conclusion be noted that international bodies raised no objections concerning the democratic credentials of the old electoral law, and that elections conducted on the basis of that law were recognized.

There are thus no real grounds for raising objections to the new Electoral Code, whose stronger democratic credentials, as shown above, are self-evident.

Regard for the rights to freedom of conscience, religion and creed

The Republic of Belarus is a newly independent State. The transition from the authoritarian Soviet system, one of the guiding principles of which was the imposition of atheism, is not yet complete. Nonetheless, the progress that has been made is most visible precisely in the spiritual area of public life.

Figures may not be the best of arguments in matters of religion, but the facts speak for themselves. Since the new legislation on freedom of conscience and creed came into effect in 1990, the number of religious organizations has doubled. Belarus had over 2,420 religious communities in 1999, and around 100 religious associations, monasteries and seminaries. They bring together around 50 per cent of the adult population of the country with their religious ideas, common activities and acts of worship.

According to research by the Sociology Institute of the National Academy of Sciences, 86 per cent of Belarusian believers say they belong to the Orthodox Church, about 10 per cent to the Catholic Church, 3.5 per cent say they are Protestants, and 1.2 per cent belong to other faiths - Jews, Muslims, Old Believers and members of the Uniat church among them.

The sphere of activity of religious organizations has expanded significantly. Besides acts of worship they now actively engage in charity work, proselytism, religious education and social services, and have publishing and commercial interests.

As religious organizations revive, the national and local authorities have been disencumbering places of worship, making them over to those organizations, and helping them to build new shrines. Believers now have 1,664 churches, mosques, synagogues and houses of prayer at their disposal.

The Belarusian Constitution guarantees all citizens the right to profess any religion or none. The legal status of religious organizations is regulated by laws reflecting the interests of both believers and non-believers. All religions and creeds are equal before the law.

The church in Belarus is separate from the State, but this does not mean that the State disregards the interests of its citizens who profess a variety of religions. Article 16 of the Constitution lays down that relations between the State and religious organizations are to be regulated by legislation, due account being taken of their influence on the spiritual, cultural and State traditions of the Belarusian people.

Relations with religious organizations are handled by a specially created body, the State Committee on Religious and Ethnic Affairs.

One example of these relations was the celebration throughout the Republic of the 2000 anniversary of the birth of Jesus Christ. Celebrations were organized by a specially created national committee that operated pursuant to a Presidential edict. At the invitation of His Holiness Diodoros I, the Patriarch of Jerusalem and All Palestine, the President of Belarusia attended celebrations in the Holy Land. The Belarusian faithful welcomed the celebration of the Christian Jubilee at the State level.

Here it should be noted that the main religious festivals of the two major faiths in Belarus, Russian Orthodox and Catholic, are celebrated nationwide.

The less widespread professions are not overlooked. The country's leaders regularly attend celebrations organized by the Jewish community, and construction of a mosque in Minsk, which has its own Islamic cultural and educational centre, is nearing completion.

Interdenominational peace has been a crucial factor in social and political stability in Belarus throughout the past few years. The policy on church-State relations pursued by the country's leadership has permitted unconstrained personal self-determination and self-development in the religious sphere without a single serious conflict between members of the different faiths represented in Belarus. A never-ending mutual search for points of contact

and principles of cooperation between the powers that be and the church is, moreover, being conducted on the basis of common human moral values amidst a diversity of world views, nationalities and faiths.

Rights of women

Women in Belarus constitute the most numerous sociodemographic group, numbering 5,458,000 or 53 per cent of the total population, and have borne the brunt of the adverse effects of the transitional period. These include excessive workloads both in their jobs and at home, growing female unemployment, a feminization of poverty, deteriorating working conditions, poor representation of women in legislative and governmental bodies, particularly at the higher levels, a general increase in antisocial behaviour and domestic violence, and declining health standards.

To tackle these problems in the light of the recommendations of the Beijing Conference and the commitments into which Belarus has entered, the country drew up a national plan of action to improve the status of women over the years 1996-2000, which was endorsed by the Cabinet of Ministers in June 1996, and a Republic-wide "Women of the Republic of Belarus" programme, endorsed by the Cabinet of Ministers in August 1996, which fleshed out that plan in detail. Work is now in progress on a national plan for the ensuing period; this will take account of the recommendations made by the Committee on the Elimination of Discrimination against Women.

Belarus is one of the few States to have submitted to the United Nations Secretariat a progress report on the Platform for Action adopted at the Beijing Conference, in the form of replies to the Secretariat's questionnaire, together with proposals for action and initiatives.

The hardest current problems as regards the status of women are to be found in the sphere of employment. The job structure is such that, although significantly better educated, women put their education to use in the worst-paid occupational groups, of which they constitute an ever-growing proportion. Unemployment remains a serious problem. At a time when a sharp fall in real incomes has made women's wage packets essential for family survival, the number of jobs on offer is shrinking and competition for them has become keener.

The Republic draws up national employment programmes every year with the aim of finding people jobs and providing welfare protection from unemployment; these include a range of measures to improve women's status on the labour market.

The most effective means of palliating the social impact of unemployment is vocational training, which is increasingly being used by the employment services to restore job mobility and make women more competitive on the market for jobs. In reaction to changes on the labour market, educational institutions routinely offer training in new occupations, professions and specialist trades. The new List of Academic Specialities affords greater opportunities for women to obtain vocational and technical training thanks to a more thorough integration of individual occupations under the current Consolidated Table of Tariffs and Skills. Efforts are also being made to boost self-employment and entrepreneurial activities among unemployed women.

The national plan also makes provision for the establishment of a gender-balanced roster of staff for promotion. A number of ministries and local authorities have acted on these recommendations but overall there is as yet no specific policy of selecting and appointing women to senior positions.

The Principles governing State Family Policy, drawn up by the Ministry of Welfare and endorsed by Presidential Edict No. 46, dated 21 January 1998, have become an important tool in the regulation of relations between the State and the family. A list of priority activities calls for moves to support young families and children in particular, to strengthen the legislative base, to offer strong guarantees of employment to workers with family commitments and so forth. A concept paper on State population policy and Principles governing the Application of Population Policy were approved by resolution No. 996 of the Council of Ministers, dated 26 June 1998.

To enhance welfare protection for families with invalid children, a law has been passed amending the Families with Children (State Benefits) Act so as to extend the award and payment of State benefits and supplements to families with invalid children and children infected with the human immunodeficiency virus or suffering from AIDS until the children reach the age of 18.

The demands of families, working parents and women are primarily being met through the development of a social services system offering socio-economic, paramedical, psychological and child-rearing, paralegal and community services.

Further to these efforts, a bill on social services has been drafted to provide the basis for the legal regulation of the social services sphere, including the forms, types and principles of financing, and the conditions under which social services are to be arranged, provided and obtained. When passed, the Act will define State strategy regarding social action and the prospects for the development of the social services sector.

Belarus notes with concern the current tendency towards the feminization of poverty in countries with transition economies. Poverty is a relatively new social phenomenon in Belarus, an adverse side-effect of complex economic and social reforms and the largest environmental disaster of the century - the Chernobyl catastrophe.

In this connection we consider it extremely important that national efforts should be appropriately supported by the international community, including the United Nations system; this, in our view, would be a more thorough-going means of fostering the realization of women's rights.

Belarus submitted its third periodic report on compliance with the Convention on the Elimination of All Forms of Discrimination against Women in January 2000. We are pleased to note that the conclusions reached by the Committee on the Elimination of Discrimination against Women on completing its discussion of the report are consistent with our own intentions and will without a doubt form the basis for national action to improve the status of women.

Opposition access to the mass media

The Belarusian leadership has been devoting considerable attention to improvements in the legislation underpinning the operation of the mass media so as to bring it into line with international standards.

As of 1 February 2000, a total of 1,093 periodicals were registered in the Republic, of those only 200 or so are published by the State.

Any independent publication, including opposition publications, is freely available at all Soyuzpechat kiosks - even the kiosk at the Presidential Residence. There are no obstacles to the placement of printed publications on the Internet, and a significant proportion of the opposition press has its own Web sites.

The State Committee on the Press intends to revive the former tripartite group, which included the independent Belarusian Association of Journalists, working on refinements to the legislation governing the mass media. Media activities are also being discussed within the framework of the social and political dialogue in which over 100 political parties, social entities and trade unions are taking part.

Belarusian television, radio stations and newspapers genuinely do give opposition and independent points of view access to the State-owned media. Accusations that freedom of expression is being "squeezed" are therefore wholly unjustified. Only recently the State electronic media mounted a series of broadcasts featuring representatives of all social and political groups including the opposition parties. Representatives of the opposition including M. Grib, S. Bogdankevich, A. Dobrovolsky, A. Lebedko, S. Kalyakin, O. Abramova, N. Statkevich and V. Vecherko are regularly to be seen and heard on the air, often live. This is a conspicuous demonstration that demands for all potential participants in the forthcoming parliamentary elections to be granted access to the media are being met.

When the electoral campaign proper begins, access to the media will be regulated by the appropriate parts of the Electoral Code, which require equal opportunities for all registered candidates.

Independence of Judges

The independence of judges in the administration of justice and the subordination of the courts to the law alone are guaranteed by article 110 of the Constitution. Interference of any kind with judges' administration of justice is prohibited and punishable by law.

Guarantees of judges' independence are set forth in the Judicial System and Status of Judges Act of 13 January 1995, as amended.

According to article 9, third paragraph, of the Act, for example, judges' independence is guaranteed by the legally established procedure for their selection, appointment and removal, by their inviolability, by the judicial procedures by which justice is administered, by the confidentiality of the conferences at which judges hand down decisions, demands for disclosure

being prohibited, by the penalties inflictable for contempt of court or interference in the settlement of particular cases, by the establishment of the requisite organizational and technical conditions for courts to operate, and by material and social provision for judges and established safeguards commensurate with their high standing.

Judges' independence is a key element in their legal status in the Republic of Belarus.

Judges' independence is being consolidated as the process of judicial reform continues; one stage of this process has taken the form of the adoption of a new Criminal Code and Code of Criminal Procedure. New legislation in this area takes account of the experience of the United Nations and European regional organizations. It provides fuller coverage of citizens' right to judicial protection and enhances the authority and role of judges and lawyers.

Freedom of assembly

Freedom of assembly, political gatherings, street processions, demonstrations and picketing is enshrined under article 15 of the Constitution. The State will guarantee this freedom provided that assemblies, political gatherings, and street processions do not violate public order or individual rights and liberties.

The procedure under which such events are to be arranged, conducted and terminated is laid down in the Assemblies, Political Meetings, Street Processions, Demonstrations and Picketing Act of 30 December 1997. The objective of this Act is to secure conditions for the full enjoyment of citizens' constitutional rights and freedoms within the bounds laid down in Belarusian law and subject to the country's international obligations.

Under the Act, assemblies, demonstrations and other mass events may be prohibited only if their objective is violent change to the constitutional order or the advocacy of social, ethnic, religious or racial hatred.

Rights of ethnic minorities

According to data from the 1999 population census, 18.8 per cent of the Belarusian population is made up of members of ethnic minorities. In all, there are over 100 nationalities living in Belarus.

Recent sociological research has shown that there are no objective reasons why inter-ethnic relations in Belarus should deteriorate. The ethnic harmony in Belarusian society is explained by citizens' mental outlook, historical traditions, close and long-standing relations between different ethnic groups, and the ethnic policy pursued by the Belarusian leadership.

The Belarusian State has announced the democratic principles governing its ethnic policy, which are laid down in national legislation and match international standards on the matter, and acts upon them. It has acceded to the principal international conventions, covenants and protocols on human rights, particularly those concerned with the human dimension (a total of 29). It has signed and is complying with about 60 intergovernmental and inter-departmental

agreements and treaties with other States on matters to do with education, science, culture, information, and protection of the rights of individuals belonging to ethnic minorities.

A State Committee on Religious and Ethnic Affairs was set up in January 1997, with corresponding structures in the oblast centres and the City of Minsk, to oversee and coordinate compliance with Belarusian law and international relations in this area. The Committee has an Ethnic Communities Coordinating Board attended by representatives of 16 ethnic associations and 19 State authorities, whose purpose is to discuss problems and reconcile the interests of the ethnic and cultural associations of ethnic communities with those of the authorities.

There are over 200 associations, bringing together citizens of 17 different ethnic identities, in existence at the national and local levels. Many of these are more numerous and influential than political parties. For instance, the Belarusian Association of Jewish Organizations and Communities embraces 91 organizations and 18 communities. The Belarusian Polish Union has membership of over 25,000 and extends over some 150 organizations and structures in one-third of all the administrative divisions of the country. Over 90 performing-troupe collectives set up by ethnic minority associations are in operation.

There are schools and individual classes in which instruction is given in Polish, Lithuanian or Hebrew. For instance, over 15,000 pupils attending the State education system are learning Polish; classes taught in Polish, at parents' request, are to be found in 300 schools in Grodno oblast; there is a special school in Grodno that teaches all subjects in Polish.

There are a large number of adult schools, mostly Jewish and Polish, based around State educational and cultural institutions. As regards ethnic Russian Belarusian citizens, it may be noted that Russian is the second State language and instruction in Russian is available in schools everywhere.

Associations of ethnic minorities work in close contact with, and with support from, the governmental, educational, cultural, press and other State authorities.

For instance, the 100th anniversary of the birth of the Jewish poet Iza Kharik was widely celebrated in 1998 with poetry evenings, exhibitions, lectures, a first-day cover and a street named after the poet in his home village, Zembin in Borisov District. The State budget financed the publication of a collection of his verse, *Otsel' krichu v gryadushchie goda*. At the second Belarusian Festival of Ethnic Cultures, in May 1998, Jewish art was worthily represented by performing-troupe collectives, many of which won prizes. Over 30 Jewish children's and adult groups, ensembles and collectives operate under the aegis of public entities and at State cultural and educational institutions. To name but a few examples, the Simkha Puppet Theatre in Minsk, the *Bluzhdayushchie Zvezdy* (Wandering Stars) ensemble from Polotsk and the Yiddish Miniature Theatre from Bobruysk perform extensive repertoires to high artistic standards.

Local governmental authorities are particularly careful to look after veterans of the Great Patriotic War, inmates of concentration camps and the ghettos and other victims of fascism. With help from Jewish organizations, burial grounds and cemeteries are being put in good order.

The Jewish charitable Hesed-Rakhamim centres in Minsk, Grodno, Vitebsk and Mogilev, the Israeli Culture and Information Centre in Belarus and the Jewish Sokhnut Agency are engaged in a variety of activities with the Jewish diaspora.

Jewish associations report on their activities in their own papers and magazines: *Aviv*, *Mezuza*, *Chaveirim* and *Mishpocha*; they feature regularly on such Belarusian Radio and Television programmes as *Mnogogolosie* and *Obshchnost*.

The State Committee on Religious and Ethnic Affairs announced and ran in 1999, in conjunction with the State Committee on the Press, a nationwide contest among periodicals and magazines for their coverage of State ethnic policy and the development of ethnic culture in ethnic communities in Belarus and their promotion of an advanced culture of inter-ethnic relations.

Ethnically Jewish Belarusian citizens can attend to their religious needs without hindrance. Belarus has 13 orthodox communities, eight progressive communities and a Judaic Religious Association.

One way in which the State authorities have been working with Jewish religious organizations is by making over to them former synagogue buildings and other constructions suitable for worship. A synagogue building was handed over to the Jewish religious community in Grodno in 1992. In 1996, the Judaic Religious Association was granted title to a building of over 2,000 square metres, with an adjoining plot of 0.39 hectares, at ulitsa Daumana 136. In May 1998 the Minsk Judaic religious community was granted title to a former synagogue at ulitsa Kropotkina 22. Decisions are currently pending on the transfer of former synagogue buildings and structures suitable for worship to Judaic religious communities in Baranovichi, Kalinkovichi and Mogilev. There are plans to build a synagogue in the Belarusian capital.

## Rights of the child

Belarusian policy on children establishes as the supreme political and socio-economic task of the State that of ensuring comprehensive, guaranteed protection, by the State and society, of the children, families and mothers of the present and future generations. This task is laid down in article 32 of the 1994 Constitution (as amended in 1996) and forms the backbone of the rights of the Child Act adopted by the Supreme Soviet of the Republic of Belarus on 19 November 1993, which is based on the United Nations Convention on the Rights of the Child. The Act defines the legal status of the child as an independent individual; it seeks to ensure the physical and moral health of the child and to foster ethnic self-awareness on the basis of the common human values of world civilization. Special care and social protection is guaranteed for children experiencing problems in their mental or physical development, children deprived of a family background and children finding themselves in other straitened or extreme circumstances.

Various kinds of action have been taken to protect children in Belarus. Presidential Edict No. 150, dated 19 April 1995, endorsed a comprehensive National Plan of Action for the Protection of the Rights of the Child, 1995-2000, which covers all aspects of the lives of the younger generation. The Ministry of Education serves as the coordinating body for work under the National Plan.

A National Commission on the Rights of the Child has been set up, regulations governing it and its composition have been approved. This is a central State and public body responsible for coordinating the execution of State policy on children. It is headed by the Deputy Prime Minister of the Republic.

A Presidential programme, "Children of Belarus", with sub-programmes covering children of Chernobyl, disabled children, children missing one or both parents, the development of social services for families and children and the development of a children's food industry, was endorsed by Presidential Edict No. 3 dated 6 January 1998. Its objective is to protect children's rights and ensure their social welfare.

The "Children of Chernobyl" sub-programme covers a range of measures designed to ensure that children who suffered in the Chernobyl accident receive various kinds of assistance and are supplied with food with medicinal properties, that general educational programmes are arranged for them, and that scientific research is conducted.

The sub-programme for disabled children calls for a range of measures to prevent childhood disability, a system of rehabilitation programmes to develop such children's creative abilities and encourage them to take part in work and sports, the manufacture of special equipment and training of skilled staff to work with sick children, besides scientific research.

The sub-programme for children missing one or both parents lists activities by means of which it is hoped to forestall social neglect: laying the foundations of a system of physical, technical, legal and academic facilities designed to allow such children to be looked after under normal conditions and grow physically and mentally sturdier, helping to settle them into families, increasing the number of medical and educational rehabilitation facilities, and training staff to work with the socially bereft.

Despite all these efforts, however, there are some problems that continue to get worse. Society is particularly alarmed at the growth in juvenile delinquency, which is attributable to a variety of reasons. Industrial output is falling under the influence of socio-economic upheavals, unemployment is on the rise, and the social standing of families with children is declining. The family is undergoing a great crisis: the number of broken and unhappy families, families with distorted senses of values and morals, is on the increase.

In June 1998 the Parliament held hearings on the subject of human rights where the statements delivered by members of the House of Representatives, representatives of the powers of the land, public organizations and academics made much of the rights of the child.

The judicial consideration of cases with reference to the United Nations Convention on the Rights of the Child and the Belarusian Rights of the Child Act is becoming widespread practice. In July 1998 the Brest District Court was considering an application to place a 12 year old child in the custody of its mother. Referring to the Convention on the Rights of the Child and taking account of the boy's best interests, the court determined, pursuant to article 66 of the Belarusian Marriage and Family Code, to grant the mother's application which coincided with the child's wishes. Members of the local education department brought an action in

defence of the honour and dignity of a pupil at a school in the Lyakhovich district of Brest Oblast. The action contained a reference to the Belarusian Education Act and Rights of the Child Act (art. 9). The offending parties were sacked from the school.

At present over 100 non-governmental organizations are working to give effect to the United Nations Convention on the Rights of the Child and periodically evaluate the progress made, nationally and regionally. The most authoritative of these are the Belarusian Children's Fund, the Belarusian "*My -- detyam*" Fund for Child and Adolescent Welfare, the Children of Chernobyl Committee, "Independent Aid for Children", "*Nadezhda-Express*", plus national associations of disabled children's parents, large families and so forth. Representatives of these associations sit on the National Commission on Children's Rights, are active in efforts to support children and to compile and carry out educational programmes, draft and discuss new legislation; they were enlisted to discuss the contents of the periodic report awaiting submission. Further development of cooperation between State authorities and public entities is one of the State's strategic tasks in the field of children's rights.

Besides the alarming demographic situation, the aftermath of the disaster at the Chernobyl nuclear power station is a serious problem for Belarus. There are at present 530,000 children and adolescents living on land contaminated with radionuclides. Investigations of their health have revealed undesirable trends in a number of the indicators used to characterize health quality:

An increase in the incidence of first- and second-degree thyroid hyperplasia, especially in the youngest age groups;

A rise in the number of cases of autoimmune thyroiditis and thyroid cancer in children;

A growing group of children displaying clinical and laboratory signs of immunological deficiency;

An increase in the number of children displaying all the symptoms of anaemia;

A rise in the incidence of neuro-circulatory dystonia and asthenia-related conditions.

Over the past 10 years the number of children presenting with malign neoplasms has risen from 8.0 per 100,000 population in 1987 to 13.0 in 1996 and 15.2 in 1997. In the main, the rise in morbidity is associated with an increased incidence of solid tumours. The incidence of leukaemia varies to some extent in some parts of the country but has not exceeded peak pre-accident levels. There has, however, been a tendency for onco-haematological illnesses to rise overall. The number of leukaemia patients stands at 44.7 per 100,000 children (80-100 cases per year). Of particular concern is the rise in cases of thyroid cancer among children. Before the accident there were 1-2 such cases per year; since the accident, over 450 children have been operated on for the same reason, more than half of them children living in Gomel oblast.

Belarus has retained its traditional system for keeping children healthy. Regarding organized healthy activity for schoolchildren as a form of social welfare for children and their families, the State defrays a significant proportion of the costs of sending children to fitness camps. Fitness activities are financed out of the State social insurance scheme and local budgets.

and by enterprises. Parents' contributions amount to 10-15 per cent of the total cost. A significant proportion of the children attending fitness camps, sanatoriums, rest homes, tourist resorts, school summer camps, labour and recreation camps, etc., come from areas contaminated as a result of the accident at the Chernobyl nuclear power plant. Some of the children from the affected regions also go abroad every year to recuperate.

Since 1998, the Ministry of Education has been working on a bill to amend the Education Act that has been in effect since 1991. Passage of the bill is expected in the year 2000. No fundamental changes are expected in article 4, which lays down the goals of education, because fostering the all-round development of the personality and the full realization of individuals' creative capacities, inculcating informed respect for a world order based on an acknowledgement of all peoples' political, economic and social rights and for democracy as a form of government and existence that enables every individual to participate in decisions intended to improve society, and helping to instil humanity and mercy into relations between people are still valid goals and principles for an educational system in these latter days.

At present Belarus has a nationwide system of continuous education beginning at the pre-school level. As of 1 January 1999 the country had 4,500 pre-school institutions. These catered for 434,400 children, or 65.3 per cent of the total child population (74.9 per cent in urban areas, 39.5 per cent in rural districts). Of these, 45.9 per cent attend pre-school institutions in which Belarusian is the normal language of intercourse, 42.4 per cent attend institutions where Russian is spoken, and 11.7 per cent, institutions using both Belarusian and Russian. At parents' request, a number of pre-school institutions in Vitebsk, Grodno and Brest oblasts also function in Polish, German and other languages. Among the general mass of pre-school institutions there are 6 development centres, 13 enhanced-programme institutions, 163 school-kindergarten complexes, 32 remedial institutions for children with special mental and physical development characteristics, and 27 kindergarten-cum-health centres.

General education, consisting of three levels - primary (4 years), basic (9 years) and middle (11-12 years), is the central link in the system of continuous education, enabling children to develop their various creative abilities and acquire the underlying habits of intellectual and physical work. In 1998-1999, Belarus had 4,783 daytime general schools in operation (1,600,500 pupils), including 738 primary (15.4 per cent, with 20,600 pupils), 1,064 basic (22.2 per cent, with 77,300 pupils), and 2,779 middle schools (58.1 per cent, with 1,396,000 pupils).

The next link in the system of continuous education is higher education. As of 1 September 1999 there were in Belarus 42 State-run institutions of higher learning (207,200 students) operating under the aegis of 10 different ministries and departments: of these, 22 belong to the Ministry of Education system, with 137,000 students. Of the 42 State-run institutions, 17 are universities, 9 are academies, 12 are institutes, 3 are higher colleges and 1 is a training centre. The country also has 15 non-State-run institutions of higher learning (36,500 students). In all, 76.2 per cent of the total number of needy students are housed in boarding facilities. Under the rules governing admission to institutions of higher and specialized secondary learning in the Republic of Belarus, children bereft of parents or parental care and

invalids in categories I and II for whom, in the view of expert medical rehabilitation commissions, education is not contra-indicated can be enrolled without regard to their overall ranking provided they receive positive grades in the entry examinations.

Action to promote human rights nationally and regionally

The determination of the Republic of Belarus to develop regional cooperation in this area is reflected in a series of agreements between Belarus and the Russian Federation relating to the establishment of a human rights institute. In particular, article 16 of the Treaty on the Creation of a Union State calls for the establishment of a human rights commission to uphold and protect the basic rights and freedoms of citizens of the Union. Belarus and the Russian Federation are at present working actively on the establishment of such a commission.

The establishment of the human rights commission will stand in testimony to the determination of the two States to ensure that citizens of the Union State enjoy equal rights to the fullest extent possible, and in confirmation of their unswerving commitment to respect basic human and civil rights and freedoms in accordance with the generally recognized principles and standards of international law.

It should also be noted that Belarus is considering the possibility of establishing a position of children's ombudsman.

The observance of human rights in the Republic of Belarus is a constant concern of the Government. To this end, on 1 March 1999 the Council of Ministers endorsed a National Plan for Human Rights Education, 1999-2004. Work on a national programme of action for the defence of civil rights during the creation of a civilian society, 2000-2005, is currently nearing completion.

## THE JUDICIAL SYSTEM AND THE STATUS OF THE JUDICIARY IN BELARUS

### The system of judicial organs

Pursuant to the Constitution, judicial authority in Belarus belongs only to legally constituted courts and is exercised independently of the legislature and the executive.

In accordance with article 1 of the Judicial System and Status of Judges Act, justice is administered by the general, economic and other courts provided for in Belarusian law. The general courts include: the Supreme Court of the Republic of Belarus, oblast-level courts, the Minsk Municipal court, district (urban) courts and military courts. The economic courts include: the Higher Economic Court, the oblast-level economic courts and the courts assimilated to them, and the municipal and district economic courts. The system of general and economic courts allows for the constitution of specialized benches and, in the circumstances provided for in Belarusian law, the establishment of special-purpose courts: courts for juveniles, family affairs, administrative cases, questions of land, taxation, etc.

Article 109 of the Constitution prohibits the formation of special courts.

Public confidence in the judiciary

Belarus believes that the administration of justice is, in any State, a very clear and very sensitive indicator of the society's degree of social maturity. The greater the role and authority of the courts and of the judicial system in general and the greater the autonomy and independence of the courts, the more life in the State will be law-abiding and democratic and the better people's rights and freedoms will be protected against infringement.

Citizens' rights to protection before the courts are set forth, together with the main principles of the administration of justice in Belarus, in article 60 of the Constitution.

The hackneyed opinions to the effect that in Belarus there are massive violations of human rights and no effective judicial protection are belied both by judicial practice and by judicial statistics.

Belarusian citizens are making ever fuller and more active use of their right to judicial protection. Whereas in 1993 citizens turned to the courts for the resolution of civil disputes no more than 100,000 times, in 1997 general courts heard 137,000 civil cases alone. In 1998, opinion polls showed that 38 per cent of the persons questioned trusted the courts. What is the basis for that trust?

In the first place, in 1997 alone some 94 per cent of citizens' applications to a court were acknowledged to be justified and the demands in them were satisfied by the courts. Of particular note are the high success rates in: suits for restoration in employment (42 per cent); cases brought against mass media for the protection of citizens' honour and dignity; complaints of notarial malpractice (81 per cent) and petitions for determination of the inaccuracy of records of civil status (94 per cent).

The percentage of appeals from citizens in connection with the protection of their constitutional rights and freedoms is also rising uninterruptedly. Class actions for the protection of property, housing or labour rights are now commonplace. Growth in the numbers of complaints against improper action by officials or organs of State management, petitions for the amendment of preventive measures in criminal cases and complaints of violation of electoral rights has also been gathering pace in recent years.

It is clear from analysis of the situation that the increase in the number of such cases derives from growth in people's sense of justice and knowledge of the law, and not from growth in breaches of citizens' rights by State officials or bodies. Breaches of the kind in question are gradually emerging from the category of latent offences hidden from the judicial system by the power of the State or citizens' fear of possible adverse consequences.

It is true that just a few years ago it was difficult to see how anyone could protest the actions of a senior official to the courts. In 1997, however, some 2,000 citizens filed such complaints with courts of general jurisdiction and 67 per cent of the complaints were found to be justified and were satisfied.

Hence, the right to judicial protection proclaimed in the Constitution is not mere words. It is increasingly being given genuine effect, primarily through the growing body of jurisprudence.

The general principles of the formation of courts

Article 7 of the Judicial System and Status of Judges Act provides that courts are formed through the election or appointment of judges.

The presidents, vice-presidents and judges of the Supreme Court and the Higher Economic Court are elected by the Supreme Council of the Republic of Belarus and serve for an indefinite period.

The judges of oblast-level courts; the City of Minsk court; district (urban) courts; military courts; oblast-level, urban and district economic courts and specialized courts are appointed by the President of the Republic and, with the exception of those appointed judges for the first time, also serve indefinitely. Judges serving an initial appointment will be appointed for an indefinite period after five years' service.

Judges for administrative and enforcement proceedings are appointed by the President of the Republic for five-year terms.

Time spent working as a judge in administrative and enforcement proceedings is taken into account when individuals are appointed to judgeships.

Procedure for obtaining a post as a general-court judge and subsequent training requirements

In Belarus, the requirements applicable to candidates for post as judges, the powers of judges' qualification boards and other matters relating to the operation of the judicial system are governed by the Judicial System and Status of Judges Act of 13 January 1995.

Article 62 of that Act provides that candidates for a post as a judge must be citizens of the Republic and at least 25 years old. In addition, they must have a university-level legal education (with the exception of judges in the Patents Division of the Belarusian Supreme Court, who must have a university-level legal education or a university-level engineering or science education) which their behaviour has done nothing to discredit and at least two years' working experience in the legal field or two years' approved training and a pass in the qualifying examination. The requirements regarding working experience or training and success in a qualifying examination do not apply to judges in the Patents Division of the Supreme Court who hold an engineering or science degree.

The Regulations on Qualification Boards for Judges of Courts of the Republic of Belarus were endorsed by Edict of the President of the Republic of Belarus No. 626 of 4 December 1997 concerning measures to regulate the activity of the courts. The Regulations laid down the legal foundations for the formation and activity of judges' qualification boards.

Judges' qualification boards are formed in order to maintain high professional and moral standards among judges and reinforce the guarantees of the independence and prestige of the judicial profession.

The following qualification boards exist in Belarus:

The board of Supreme Court judges;

The boards of oblast-level (City of Minsk) court judges and district (urban) court judges;

The board of Belarusian Military Court and inter-garrison court judges;

The board of economic court judges.

The board of Supreme Court judges is elected by the Plenum of the Supreme Court from among the members of the Court.

The qualification boards of oblast-level (City of Minsk) and district (urban) court judges and those of Belarusian Military Court and inter-garrison court judges are elected at conferences of judges of the courts concerned from among the members of those courts.

The qualification board of economic court judges is elected by the Plenum of the Higher Economic Court from among the members of economic courts.

The sizes of qualification boards, the rules for the representation on them of junior judges and the voting regulations are fixed by the corresponding court plenums and conferences of judges in agreement with the Ministry of Justice.

Each qualification board includes a representative of the relevant organs of justice, who has the right to vote.

Qualification boards are constituted for terms of three years and are required to report to the corresponding court plenums and conferences of judges at least once a year, as well as at the end of their term.

The competence of judges' qualification boards extends to the following:

Approval of the composition of the boards administering the qualifying examinations for candidates for judgeships;

The determination, jointly with the presidents of the corresponding courts, of procedure for the preparation and holding of qualifying examinations;

Examination of candidacies for judgeships and, depending on their results in the qualifying examinations, recommendation of candidates for appointment or not;

The testing of judges' skills and the award to judges of qualification grades, etc.

Tests of judges' skills are conducted with a view to improving the quality of the judiciary, ensuring that judges are up to their tasks, promoting their professional development, determining their need for further training, and increasing their responsibility for observance of the law in the administration of justice. The tests are intended to provide an objective evaluation of judges' professional knowledge and ability to apply that knowledge in administering justice, their professional qualities and the degree to which they meet the requirements laid down in the Constitution and the legislation adopted pursuant to it.

The results of the tests serve as the basis for the issuance of Presidential edicts appointing or dismissing judges or awarding qualification grades.

It should be noted that no judge has been appointed or removed without a corroboratory conclusion from a qualification board. During the period 1979-1999, a total of 100 judges, including 18 judges of oblast-level courts, were removed from office for a variety of reasons. The commonest reasons were: removal at own request, 46 judges; retirement, 30 judges; other reasons, 24 judges.

Further to Presidential Edict No. 348 of 30 June 1998 there is now in operation, as part of the Belarusian State University, a Retraining and Skills Enhancement Institute for judges and officials of the Procurator's Office, the courts and other organs of justice. Some 200 judges of oblast-level and district (urban) courts attend the Institute each year.

There is also a system whereby judges study the application of the law by courts of general jurisdiction.

Work volume and caseload, time spent and satisfactoriness of consideration of criminal and civil cases in 1999

In 1999, district (urban) courts considered and passed sentence in 48,716 criminal cases; this is 0.7 per cent higher than in 1998. In all, the courts tried 59,862 individuals; this is 0.3 per cent higher than in 1998.

A total of 113,404 civilian cases were considered and settled; this is 1.2 per cent less than in 1998. The courts conducted 272,592 administrative hearings; this is 4.8 per cent more than in 1998.

In recent years there has been a tendency for the time spent in considering criminal and civil cases to diminish. In 1999, district (urban) courts took over one month to consider 1,857 (3.8 per cent of all) criminal cases, and longer than the procedural deadlines set to consider 2,280 (1.7 per cent of all) civil cases; the corresponding figures for 1998 were 2,995 (6.2 per cent) and 5,038 (3.6 per cent).

The average monthly workload per judge in 1999 was 7.5 criminal and 19.4 civil cases. This is somewhat higher than in 1998.

Nationwide, the number of administrative hearings per judge averaged 134 per month.

The satisfactoriness of criminal proceedings remained at its previous level. In all, 1,282 sentences were quashed in cassation proceedings: this represents 2 per cent of the cases heard.

As in 1998, the satisfactoriness of civil proceedings has improved. In all, 1,949 decisions (1.7 per cent) were overturned, whilst 2,276 (2 per cent) were overturned in 1998.

The oblast-level courts and the City of Minsk court of first instance heard and passed sentence in 645 criminal cases involving 959 individuals: this is 1.5 per cent more than in 1998.

The satisfactoriness of criminal proceedings improved somewhat. The Supreme Court set aside 41 sentences (4.2 per cent) in cassation proceedings and on judicial review, as against 52 sentences (5.2 per cent) in 1998. Proceedings in 121 civil cases were brought to a conclusion: this is 14.1 per cent more than in 1998, and the satisfactoriness of the proceedings improved somewhat.

In 1999 the district (urban) courts handed down 3,467 partial rulings in criminal cases; this is 18.9 per cent higher than in 1998.

| Year | Criminal cases heard | Sentences passed | Condemned (individuals) | Acquittals (individuals) | Referred for further investigation (individuals) |
|---|---|---|---|---|---|
| 1997 | 54 203 | 47 401 | 57 846 | 466 | 5 381 |
| 1998 | 54 239 | 48 389 | 59 700 | 272 | 4 827 |
| 1999 | 55 217 | 48 716 | 59 862 | 179 | 4 719 |

Belarusian courts consider cases within deadlines laid down in the legislation governing criminal procedure. A decision to send a case to trial must be handed down by a judge or court in administrative session not more than 10 days after the case is submitted to the court. Consideration of the case in judicial session must begin not later than 14 days after it has been decided or determined by the court in administrative session to commit the accused to trial.

On average about 1.5 per cent of criminal cases take longer than a month in court.

Pay for judges in the general courts in Belarus

Judges' pay consists of:

1. Their official salaries (established as percentages of the official salary of the president of the Supreme Court);

2. Supplements for classes awarded (from fifth to senior);

3. Long-service supplements (between 10 and 40 per cent of the sum of items 1 and 2);

4. Supplements for complex and stressful work (up to 50 per cent of salary);

5. A bonus (from 50 per cent of salary).

An average judge's pay in May 2000 was:

1. In the oblast-level courts, 118,000 roubles;

2. In the district courts, 87,000 roubles.

Judges receive holiday pay amounting to 1.7 times their official monthly salary. The source from which they are paid is the State budget.

## THE SYSTEM OF ECONOMIC COURTS

### Procedure for the acquisition of judgeships in the economic courts, requirement to improve qualifications

Under articles 6 and 7 of the Economic Courts Act, a citizen of the Republic of Belarus who has reached the age of 25 and has a university-level legal education and not less than two years' working experience in a specialized legal field, or who has duly undergone a two-year on-the-job training course and committed no degrading misdemeanour, may become a judge of the economic courts. To become a judge of the Higher Economic Court, five years' working experience in a specialized legal field is required.

A candidate who meets these requirements may be admitted to the qualifying examination for judges of the economic courts.

The qualifying examination is administered by an examination board operating under the authority of the Higher Economic Court which, in conformity with the Regulations on qualifications boards of the courts of Belarus endorsed by Presidential Edict No. 626, dated 4 December 1997, is approved by the Economic Courts Qualifications Board. The examination board is composed of judges of the economic courts.

A specimen list of questions for use in qualifying examinations for judges of the economic courts was endorsed by resolution No. 8, adopted by the Plenum of the Higher Economic Court on 20 July 1999. The list includes general questions on the Constitution, the legal system and judges' status, issues of economic procedural law, and questions relating to civil, criminal, tax and customs legislation and administrative misdemeanours.

The results of the qualifying examination are valid for one year from the time the examination is passed and throughout the period during which the individual concerned works as a judge in the economic courts.

The Economic Courts Qualifications Board decides, on the strength of the results of the qualifying examination, whether or not to recommend a candidate for appointment as a judge.

A candidate may reapply to the Board, but not during the year following its decision.

The Qualifications Board operates as part of the system of economic courts in the Republic of Belarus. It is governed, as mentioned above, by the Regulations on qualifications

boards of the courts of Belarus endorsed by Presidential Edict No. 626, dated 4 December 1997. The Economic Courts Qualifications Board comprises seven judges of the economic courts and a representative of the Ministry of Justice. The members are elected for three-year terms by the Plenum of the Higher Economic Court.

Once every five years, judges of the economic courts attend the Institute for Retraining and Further Studies for judges, employees of the State Procurator's Office, courts and institutions of justice at the Belarusian State University in order to hone their skills.

Two judges were removed from the roll in 1999, one at his own request, the other upon his death. This year one judge has been removed, at his own request.

Pay of judges of the economic courts

The source from which judges are paid is the State budget.

Presidential Edict No. 771 of 4 December 1997 sets the official salaries of the President and governmental officials as multiples of the basic wage rate. Presidential Edict No. 625 of 4 December 1997 sets the official salaries of judges in the Republic as percentages of the official salary of the president of the Higher Economic Court:

Higher Economic Court

| | |
|---|---|
| President | 100 |
| First Vice-President | 90 |
| Vice-President | 85 |
| Judge | 80 |

Oblast-level economic courts

| | |
|---|---|
| President | 80 |
| Vice-President | 75 |
| Judge | 70 |

Presidential Edict No. 772 of 28 December 1999 (annex 2) sets the level of salary supplements per qualification grade for judges in Belarus:

| Qualification grade | Size of supplement (x basic wage rate) |
|---|---|
| Senior | 7.0 |
| First | 5.5 |
| Second | 4.9 |
| Third | 4.0 |
| Fourth | 3.6 |
| Fifth | 3.3 |

Presidential Edict No. 624 of 4 December 1997 states that "the supplement for long service, complex or stressful work and notable performance by officials, the first vice-president and the vice-presidents of the Higher Economic Court is hereby set at 50 per cent of their official salary".

Presidential Edict No. 545 of 27 November 1997 lays down that State employees and individuals appointed to (elected to, confirmed in) positions in the State bodies operating under the authority of the President shall receive salary supplements for long service in the following amounts:

| | |
|---|---|
| 1 to 5 years | 10% |
| 5 to 10 years | 20% |
| 10 to 15 years | 30% |
| Over 15 years | 40% |
| | of official salary |

By order of the Ministry of Labour No. 8, of 24 January 2000, annex 1, "Remuneration for employees of the organs of State administration", (order No. 70 of 19 January 2000, amending order No. 84 dated 21 January 1998 by the Council of Ministers):

1. Estimates for judges' maintenance shall include provision for outlays of up to 10 per cent of official salary in supplements for complex and stressful work and for notable achievement.

2. Judges shall be awarded bonuses, budget resources in the amount of 50 per cent of their official salaries being set aside for this purpose.

3. Judges shall be awarded material assistance in the amount of 1.7 times their official [monthly] salary per year, normally payable when they take annual leave. They shall also be given assistance in dealing with unforeseen material difficulties, 0.3 times their official [monthly] salary being set aside for this purpose.

## THE LEGAL PROFESSION IN BELARUS

The operation of the legal profession is governed by the Legal Profession Act of 15 June 1993 and Presidential Decree No. 12 of 3 May 1997, "Measures to improve the operation of the legal and notarial professions in the Republic of Belarus".

Under article 7 of the Legal Profession Act, a citizen of the Republic of Belarus with a university-level legal education who has at least three years' working experience in the legal field or, lacking such experience, has undergone an on-the-job training programme of between six months and a year in the legal profession, and who has passed the qualifying examination and received a licence to practise as a lawyer, may be a lawyer in the Republic of Belarus.

The procedure for the administration of the qualifying examination is governed by the Regulations of the Lawyer Qualification Commission of the Republic of Belarus, approved by the Minister of Justice on 4 June 1997, as subsequently amended. The qualifying examination includes:

Replying to oral or written questions on substantive and procedural law;

Solving practical problems;

Comparing legal documents; and

An interview.

The schedule for the examination is drawn up by the Belarusian Law Association, as the Regulations require. Admission to a bar association is by decision of the association's Presidium. Anyone who has obtained a licence to practise as a lawyer is entitled to apply for admission to the corresponding oblast-level (City of Minsk) bar association. The legal profession is exercised in Belarus only by individuals who are members of a bar association. This requirement corresponds to the practice in many countries. Membership of the appropriate professional organization is a requirement in the United States of America, Poland, Sweden and elsewhere, given the particular nature of a lawyer's activities, access to the materials of criminal investigations, and the high moral standards required of lawyers.

Bar associations are exempt from all general State taxes, levies and other payments, including the special tax to finance the clean-up after the disaster at the Chernobyl nuclear power station. The intention of this provision is to strengthen the associations' financial standing, make available better legal assistance to the needy and provide citizens with legal assistance free of charge.

Under article 11 of the Legal Profession Act, the Lawyer Qualification Commission is appointed by the Ministry of Justice for a three-year term and numbers not less than nine persons: lawyers with at least five years' working experience, representatives of State bodies and other experts in law. It is chaired by the Deputy Minister of Justice. According to article 3 of the Regulations governing the Commission, its members must include not less than four representatives of the legal profession, among them the president of the Belarusian Bar Association who is a member ex officio.

Under article 24 of the Act, membership of a bar association ceases as a result of removal or disbarment by decision of the Presidiums of the oblast-level (City of Minsk) bar associations.

Removal from a bar association may take place:

1. At the lawyer's request:

If on health grounds he finds himself incapable of performing his duties;

If he practises outside the bar association.

2. Disbarment from a bar association occurs if the individual concerned commits a misdemeanour incompatible with the calling of a lawyer:

Systematic breaches of the Legal Profession Act or the lawyers' rules of professional ethics, or failure to perform the duties of a lawyer in good conscience, when disciplinary action has previously been taken for such breaches;

If circumstances come to light indicating that a lawyer acted illegally in obtaining his licence to practise.

Withdrawal of the right to practise as a lawyer is also authorized in the event of tax evasion.

Seven lawyers had their licences withdrawn on motions from the Presidiums of the oblast-level and City of Minsk bar associations in 1999: three for conduct incompatible with the calling of a lawyer, and four for systematic breaches of the Legal Profession Act or the rules of professional ethics.

Licences to practise as a lawyer are suspended if the lawyer takes up judicial or other duties counting towards length of service in the State apparatus, or moves to another organization, enterprise or institution, or enters into full-time education. Seven licences were suspended in 1999.

By virtue of article 2.4 of the rules of professional ethics approved by the Ministry of Justice on 8 December 1997, lawyers are required constantly to extend and enlarge their knowledge of the law. Belarusian lawyers undergo further training centrally, at the Belarusian Law Association, and locally, at their oblast-level (City of Minsk) bar associations. The Belarusian Bar Association runs further training courses at least four times a year. Two hundred lawyers attended such courses in 1999 alone. They were addressed by leading practitioners, legal scholars and the drafters of the new legal codes.

Training at the oblast-level and City of Minsk bar associations takes the form of lectures and seminars on set topics.

Attendance by lawyers is compulsory.

Lawyers are paid for their work out of the resources they receive from individuals and legal entities in consideration of legal assistance rendered. The size of their fees is determined by written agreement between them and their clients with due regard for their experience and qualifications, professional authority, their time and effort, and the other matters stipulated in article 6.2 of the rules of professional conduct. If the client so wishes they may, in accordance with established procedure, accept a supplementary fee in recognition of good professional work.

Lawyers receive benefits (for temporary unemployment, child care and so forth) from the State social insurance scheme, and are also entitled to State pensions.

## THE OFFICE OF THE STATE PROCURATOR IN BELARUS

Special (university-level legal) education and a period of practical work as an investigator or assistant procurator are required for appointment as a State procurator. The Office of the State Procurator Act contains no stipulation that an examination must be passed.

Fifteen procurators have been relieved of their duties in 1999 and the part of 2000 that has so far elapsed: six at their own request, one upon retirement, and eight for improper performance of their duties.

Procurators undergo constant further training at a centre operating year-round under the authority of the Office of the State Procurator, and at the Institute for Further Studies at the Belarusian State University. The Office of the State Procurator also regularly puts on special seminars to help staff improve their skills.

Procurators' pay depends on the jobs they occupy, their length of service and their rank. They are paid out of the State budget.

## LEGAL EDUCATION IN BELARUS

Belarus currently has 21 institutions of higher learning at which law is taught, including 10 that are not operated by the State.

At the beginning of the academic year 1999/2000 there were 27,429 students reading law at institutions of higher learning: 14,570 at State-run and 12,859 at non-State-run institutions. After completing their studies, graduates work for entities irrespective of their kind of ownership, including procurators' offices, courts and judicial institutions.

Admission to read law at a State institution of higher learning takes place in accordance with the admission procedure for State institutions of higher learning approved every year by the Ministry of Education. Admission to non-State-run institutions is governed by the rules drawn up by those institutions themselves.

The general requirements for obtaining a legal education are laid down in the State educational standard for law as a principal subject of study.

Enrollees and graduates of law classes (Speciality G.09.01.00) in State and non-State, higher educational establishments

(Numbers as at beginning of 1999/2000 academic year)

| | Enrollees (total) | Method of study | | | Graduates (total) | Method of study | | |
|---|---|---|---|---|---|---|---|---|
| | | Full-time | Evening classes | Correspond-ence course | | Full-time | Evening classes | Correspond-ence course |
| Council of Ministers (Belarusian State University) | 351 | 236 | 0 | 115 | 388 | 233 | 0 | 155 |
| Ministry of Education | 1 352 | 776 | 0 | 576 | 328 | 209 | 0 | 119 |
| Ministry of Internal Affairs | 1 090 | 465 | 0 | 625 | 953 | 480 | 0 | 473 |
| Ministry of Agriculture and Food | 114 | 60 | 0 | 54 | 29 | 29 | 0 | 0 |
| Management Academy, Office of the President of the Republic | 123 | 62 | 0 | 61 | 119 | 0 | 0 | 119 |
| Total | 3 030 | 1 599 | 0 | 1 431 | 1 817 | 951 | 0 | 866 |
| Non-State establishments | 1 743 | 1 004 | 0 | 739 | 1 365 | 279 | 22 | 1 064 |
| Grand total | 4 773 | 2 603 | 0 | 2 170 | 3 182 | 1 230 | 22 | 1 930 |

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PREVENTION OF DISCRIMINATION AGAINST AND
THE PROTECTION OF MINORITIES

# Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoplesg

## Introduction

1. In resolution 1999/23 (para. 4), the Sub-Commission on the Promotion and Protection of Human Rights decided to entrust Ms. Erika-Irene Daes and Mr. Asbjørn Eide with the preparation of a working paper, without financial implications, on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples, for submission to the next sessions of the Working Group on Minorities and the Working Group on Indigenous Populations and to the Sub-Commission at its fifty-second session.

GE.00-14237 (E)

## I. PAPER BY ASBJØRN EIDE

**Categories of rights: Some initial observations**

2. While this paper deals with rights specific to minorities and indigenous peoples, it is useful to put it in the wider context, recognizing that four sets of rights are relevant:

(a) The general human rights to which everyone is entitled, found in the Universal Declaration on Human Rights and elaborated in subsequent instruments, such as the two International Covenants of 1966. They are all individual rights;

(b) The additional rights specific to persons belonging to national or ethnic, religious or linguistic minorities, found in article 27 of the International Covenant on Civil and Political Rights (ICCPR), the Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities ("Minority Declaration"), and in several regional instruments dealing with the rights of persons belonging to minorities. They are formulated as rights of persons and therefore individual rights. States have some duties to minorities as collectivities, however;

(c) The special rights of indigenous peoples and of indigenous individuals, found in the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) and - if and when adopted - in the draft Declaration on the Rights of Indigenous Peoples ("draft indigenous declaration"), adopted by the Working Group on Indigenous Populations (WGIP) in 1993 and now before the Commission on Human Rights. They are mostly rights of groups ("peoples") and therefore collective rights;

(d) The rights of peoples as provided for in common article 1 to the two International Covenants of 1966. These are solely collective rights.

**Similarities and differences between the categories of rights**

3. Category (a). The general human rights as listed in the Universal Declaration and elaborated in other instruments are individual human rights and can be demanded by everyone, including persons belonging to minorities, indigenous peoples and other peoples. They constitute the foundation of the human rights system. They are based on the two basic principles set out in the Universal Declaration: article 1 (that everyone is born free and equal in dignity and rights) and article 2 (that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status). The individual rights include the right to integrity of the person, freedom of action, due process rights, political rights, and economic, and social and cultural rights. Their major function is to ensure social integration under conditions of equal dignity.

4. Category (b). The rights of persons belonging to minorities build on but add to the foundation rights set out in the Universal Declaration. The Declaration, in article 8.2, expresses

this in the following words: "The exercise of the rights set forth in the present Declaration shall not prejudice the enjoyment by all persons of universally recognized human rights and fundamental freedoms."

5. The specific rights of persons belonging to national or ethnic, religious or linguistic minorities include the right to enjoy their own culture; to profess and practise their own religion; to use their own language, in private and in public, freely and without interference (ICCPR, art. 27; Minority Declaration, art. 2.1); to participate effectively in cultural, religious, social, economic and public life (Minority Declaration, art. 2.2) and to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live (ibid., art. 2.3); to establish and maintain their own associations (ibid., art. 2.4); to establish and maintain free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties (ibid., art. 2.5). These rights may be exercised by persons belonging to minorities individually as well as in community with other members of their group, without any discrimination, and no disadvantage shall result for any person belonging to a minority as a consequence of the exercise or non-exercise of the rights set forth in the Declaration (ibid., art. 3).

6. Category (c). The rights specific to indigenous peoples and members of indigenous peoples are spelled out in ILO Convention No. 169.[1] More far-reaching rights are proposed in the draft indigenous declaration which was submitted by the Sub-Commission to the Commission on Human Rights in 1994 and is now under consideration there for possible future adoption by the General Assembly.

7. ILO Convention No. 169 and the draft indigenous declaration recognize the foundation of individual human rights. The draft indigenous declaration in article 1 states that indigenous peoples have the right to full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law. A corresponding provision can be found in the ILO Convention (art. 3).

8. The specific rights of indigenous peoples contained in the ILO Convention and the draft indigenous declaration are significantly different from those in the Minority Declaration. The difference can probably best be formulated as follows: whereas the Minority Declaration and other instruments concerning persons belonging to minorities aim at ensuring a space for pluralism in togetherness, the instruments concerning indigenous peoples are intended to allow for a high degree of autonomous development. Whereas the Minority Declaration places considerable emphasis on effective participation in the larger society of which the minority is a part (arts. 2.2 and 2.3), the provisions regarding indigenous peoples seek to allocate authority to these peoples so that they can make their own decisions (e.g. Convention No. 169, arts. 7 and 8; draft indigenous declaration, arts. 4, 23 and 31). The right to participation in the larger society is in the draft given a secondary significance and expressed as an optional right. Indigenous peoples have the right to participate fully, *if they so choose*, through procedures determined by them, in devising legislative or administrative measures that may affect them (draft indigenous

declaration, arts. 19 and 20). The underlying assumption must be that participation in the larger society is not necessary when they have full authority of their own to make the relevant decisions.

9. Closely linked to this point is the difference concerning rights to land and natural resources. The Minority Declaration contains no such rights, whereas these are core elements in the ILO Convention (arts. 13-19) and in the draft indigenous declaration (arts. 25-30). Other examples could be mentioned to explain the fundamental difference between the thrust of the rights of persons belonging to minorities and those of indigenous peoples. It is logically connected to the basic point that the minority instruments refer to rights of (individual) persons, whereas those concerning the indigenous refer to rights of peoples.

10. Category (d). What is the relationship between the minority rights and the rights of indigenous peoples, on the one hand, and the rights of peoples to self-determination set out in common article 1 to the International Covenants of 1966, on the other? For the rights of persons belonging to minorities, the answer is simple: the relevant instruments provide no right to group (collective) self-determination. The rights of persons belonging to minorities are individual rights, even if they in most cases can only be enjoyed in community with others. The duties of the State in protecting the identity of minorities may, however, include a duty to accept and encourage conditions for a degree of non-territorial autonomy in regard to religious, linguistic or broader cultural matters. Effective participation by minorities may be facilitated by territorial devolution on democratic, not ethnic, grounds, but the relevant minority instruments do not impose a duty on States to devolve authority on a territorial basis.

11. The question of the rights of indigenous peoples is presently under debate. Are they "peoples" in the sense of article 1 common to the two International Covenants? If they are, they should be entitled freely to determine their political status and freely to pursue their economic, social and cultural development, and for their own ends freely to dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law.

12. The controversy on this issue is still not resolved. While ILO Convention No. 169 uses the term "peoples", it emphasizes in its article 1.3 that the use of that term shall not be construed as having any implications as regards the rights which may attach to the term under international law. Quite clearly, the aim was to prevent "people" being used as an excuse to demand territorial separation. The draft indigenous declaration goes much further: it proposes in its article 3 that indigenous peoples shall have the right of self-determination and by virtue of that right be entitled freely to determine their political status and freely pursue their economic, social and cultural development. This formulation, based on common article 1 of the International Covenants, is one of the most controversial elements in the draft declaration. It has been discussed since the draft was transmitted to the Commission on Human Rights.

13. A long debate took place during the last session of the working group of the Commission set up to consider the draft declaration.[2] Representatives of indigenous groups argued in favour of a full-fledged right to self-determination, though that did not necessarily mean that the right would be used to secede from the States of which they now formed a part. Representatives of

Governments were either opposed to inclusion of the right to self-determination or sought to give it a more limited meaning than was given to that right in the context of decolonization.

14. Two revised understandings of the right to self-determination are under discussion. One concerns so-called "internal" self-determination which essentially refers to the right to effective, democratic governance within States, making it possible for the population as a whole to determine their political status and pursue their development. The other seeks to equate the right to self-determination with the right to some - but unspecified - degree of autonomy within sovereign States.

15. Conceptually and in practice, territorial autonomy should be kept separate from cultural autonomy. Their respective benefits and risks should be discussed. Generally, it is difficult to accept a principle of territorial autonomy based strictly on ethnic criteria, since this ran counter to the basic principles of equality and non-discrimination between individuals on racial or ethnic grounds. There are, on the other hand, strong arguments in favour of forms of cultural autonomy which would make it possible to maintain group identity. What is special for indigenous peoples is that the preservation of cultural autonomy requires a considerable degree of self-management and control over land and other natural resources. This requires some degree of territorial autonomy. The scope of and limits to such autonomy are difficult to specify, however, both in theory and on the ground in specific cases.

16. Whatever position one might take on this subject, which is likely to remain controversial for some time to come, it is clear that the problem of self-determination does not arise in regard to the Minority Declaration, which neither limits nor extends the rights that peoples might have under other parts of international law. The rights under the Declaration may not be construed as permitting any activity contrary to the purposes and principles of the United Nations, including territorial integrity of States [3]

**The beneficiaries of the four categories of rights**

17. Every individual, including any person belonging to a minority or indigenous group, is entitled to the human rights set out in the Universal Declaration and can claim them in regard to any authority which exercises jurisdiction over her or him. Should minority groups or indigenous peoples have a degree of self-government, their authorities are therefore also obliged to respect and protect universal human rights within their jurisdiction.

18. Special minority rights can be claimed by persons belonging to national or ethnic, linguistic or religious minorities, but also by persons belonging to indigenous peoples. The practice of the Human Rights Committee under article 27 of the ICCPR bears this out.

19. The rights of indigenous peoples, which, under present international law, are found only under ILO Convention No. 169, can only be asserted by persons belonging to indigenous peoples or their representatives. Members of non-indigenous minorities cannot assert the rights contained in that convention.

20. The ILO Convention No. 169 defines the indigenous in article 1 (b) as those "peoples in independent countries who are regarded as indigenous on account of their descent from the

populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions".

21. There is still no consensus as to which collectivities are the beneficiaries of the right to self-determination under article 1. There is general agreement that the right applies to the populations of non-self-governing territories as determined by the relevant organs of the United Nations, and to the populations living in occupied territories. It also applies to the population as a whole of sovereign States. Beyond these categories, legal opinion is still divided.

**Concluding observations**

22. A dual track has emerged in United Nations standard-setting with regard to minorities and indigenous peoples.

23. General human rights have a distinctly integrative function. Minority rights are formulated as the rights of individuals to preserve and develop their separate group identity within the process of integration. Persons belonging to minorities often have several identities and participate actively in the common domain. Indigenous rights, on the other hand, tend to consolidate and strengthen the separateness of these peoples from other groups in society. The underlying assumption is that persons belonging to indigenous peoples have a predominantly indigenous identity and participate less in the common domain.

24. What is normally held to distinguish indigenous peoples from other groups is their prior settlement in the territory in which they live, combined with their maintenance of a separate culture which is closely linked to their particular ways of using land and natural resources.

25. The usefulness of a clear-cut distinction between minorities and indigenous peoples is debatable. The Sub-Commission, including the two authors of this paper, have played a major role in separating the two tracks. The time may have come for the Sub-Commission to review the issue again. One question is whether the distinction has global relevance. It has been argued that the approach to the drafting of *minority rights* has been influenced mainly by European experience and that it therefore is profoundly Eurocentric, whereas the drafting of *indigenous rights* has been influenced mainly by developments in the Americas and in the Pacific region (the "blue water doctrine"[4]), and therefore is America-centric.[5] The distinction is probably much less useful for standard-setting concerning group accommodation in Asia and Africa.

26. Another question is whether all minorities, and all indigenous peoples, should be treated alike, or whether differentiation is required both between minorities and between indigenous groups. For persons of indigenous origin who have migrated to urban areas their separate identity may have to be combined with integration on a basis of equality within the city. Similarly, the needs of minorities who live compactly together and possibly form the majority in a particular region of a country are quite different from the needs of persons belonging to minorities who live dispersed, most of them in cities where persons of many different ethnic origins mingle together.

## II. PAPER BY ERICA-IRENE DAES

27. In accepting the task to prepare a working paper with Mr. Eide on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples, I am conscious, first of all, of the excellent and very comprehensive paper by Mr. Eide which constitutes Part I of the present working paper and of the work of a number of other legal scholars and competent bodies of the United Nations system that have preceded me and dealt with the subject matter or failed to resolve the complex question of the terms "minorities" and "indigenous" to the satisfaction of Governments and the groups concerned. My experience tells me that there is no simple solution in logic or in law concerning these terms. I do believe, however, that it is possible to simplify the argument over definition by presenting the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples, identifying certain basic factors, reviewing a number of important characteristics and eliminating many misconceptions.

28. It might be useful to begin by identifying the factors which, singly or in some combination, have repeatedly been asserted as characteristics of either minorities or indigenous peoples:

(a) Numerical inferiority;

(b) Social isolation, exclusion, or persistent discrimination;

(c) Cultural, linguistic or religious distinctiveness;

(d) Geographical concentration (territoriality);

(e) Aboriginality (i.e., being autochthonous).

29. The term "minority" has sometimes been applied to any group that constitutes less than 50 per cent of the population of a State. It has been assumed that numerical inferiority places the group at risk, thus justifying special measures of protection. This may often be true, as in the example of African-Americans in the United States. However, a numerically small group may also be a dominant elite, as was the case of the Afrikaners during the *apartheid* regime in South Africa. The numerical superiority of indigenous peoples in countries such as Bolivia or Guatemala has likewise been no guarantee of their enjoyment of basic human rights.

30. For these reasons, most previous attempts to define "minorities" and "indigenous peoples" have emphasized their non-dominant status in national society, either as a sufficient criterion, or in conjunction with the criterion of numerical inferiority. This solution poses both methodological and logical problems. The measurement of dominance can be challenging. A group may nominally control the State apparatus yet be subordinate to another group that controls, for example, the lands, finances or military institutions of the country. *De jure* dominance may be de facto subordination. More seriously, applying non-dominance as a key characteristic of minorities or indigenous peoples results in the paradox that a group ceases to be a minority or an indigenous people when it realizes its human rights, or attains social and

political equality. We are faced with a logical dilemma. Either we admit that the goal of equality will never be achieved fully, or we accept terms such as "minority" as purely situational and transitory. No minority or indigenous people has admitted that its legal status exists only at certain times, and in certain situations.

31. Is this merely a problem of language? A group asserts its rights when it feels that its rights are being violated. The problem for the international community is first to ascertain what rights a particular group may legitimately assert, as a matter of law, so that we can then determine whether legitimately claimed rights are being violated as a matter of fact. The question of whether a group is subordinate may be impossible to resolve until we agree on what kind of group it is. For example, if Afrikaners argue that they are entitled to special rights to their lands and autonomy, we must first determine whether they have a legitimate claim to being "indigenous". The fact that they lack any special rights to land cannot be a factor in deciding whether they are indigenous because that would make the exercise logically circular.

32. The existence of subordination is the reason why we need to have international instruments such as the 1992 Minority Declaration.

33. Cultural distinctiveness - whether it is linguistic, religious or ethnic - is widely assumed to be characteristic of both minorities and indigenous peoples, and is generally asserted by both kinds of groups. Indeed, indigenous peoples worldwide contend that they share a special kind of culture that distinguishes all of them from other peoples and cultures. The leaders of minorities and indigenous peoples frequently assert that the enjoyment of their distinctive cultures is the reason they are seeking collective legal recognition and self-determination.

34. It is very challenging to evaluate culture and agree on the extent to which cultures differ. To a greater or lesser extent, all groups and cultures overlap and change over time, particularly in this age of global communications. Does a group gradually lose its rights as its culture changes? Or lose its rights when it exceeds a certain threshold of cultural similarity to other groups?

35. National minorities and "racial" groups pose additional problems of relationship and distinction of their rights. They may be distinguishable from other segments of the national society only with respect to their historical origins, names, or physical appearance. These distinguishing features may expose them to discrimination, but a group's visibility or identifiability may not be associated with the existence of a distinctive group culture. Skin colour prejudice may have nothing to do with the existence of cultural differences, for example. Likewise, a group may struggle against skin colour prejudice without aspiring to the perpetuation of a distinctive culture, but simply because its members wish to escape discrimination. It is probably safest to conclude that while cultural distinctiveness may often be the objective of groups that assert rights as minorities or indigenous peoples, it should not be a threshold criterion for the legitimacy of group claims.

36. In this regard, it should be appreciated that a "minority" can be created either by the actions of the State and its citizens, or by the group itself. Some groups choose to perpetuate a distinct collective identify, while others are satisfied to assimilate into national life but are prevented from doing so by official or unofficial prejudices. Both kinds of situations may result in abuses of human rights, serious violence, and threats to international peace and stability.

37. Aboriginality (i.e. the characteristic of being autochthonous, or the original human inhabitants of a territory) appears to be obvious as a distinguishing characteristic of indigenous peoples. However, it fails to clarify many situations, especially in Asia and Africa, where dominant as well as non-dominant groups within the State can all claim aboriginality. In such situations, previous studies have proposed the use of subordination and cultural distinctiveness as further criteria, distinguishing vulnerable groups from the dominant sectors of society. But this approach fails to distinguish between indigenous peoples and minorities within African and Asian States, unless we are prepared to agree that the distinction is merely one of degree of aboriginality or cultural distinctiveness. In this case problems may arise from applying different approaches to different regions of the world: a qualitative standard in the Americas (aboriginality), and a quantitative standard in Africa and Asia (degree of aboriginality or distinctiveness).

38. The factor of aboriginality fails to clarify the situations of groups which were forcibly dislodged from their ancestral territories, compelling them either to disperse or emigrate across State frontiers. Are emigrant or diaspora groups "indigenous" at their point of origin, and "minorities" everywhere else? Every human lineage can trace roots to a territory in the world, but this does not entitle every group to assert rights as an indigenous people. On the other hand, it would seem unjust for a group to lose its claim to being indigenous at the moment it is forced to abandon its ancestral lands. How long does indigenous status survive a forced removal, and justify a claim to the right to return? Minorities and indigenous peoples share very similar experiences of oppression and displacement, but using the factor of aboriginality accords greater rights to groups that managed to remain physically in possession of their original territories.

39. Indigenous peoples contend that they not only continue to occupy parts of their original territories, but also that they have a special relationship with their lands. This is obviously a claim of cultural distinctiveness, but it may be seen as a refinement of the concept of aboriginality as well. It is a way of saying that living together in relationships is the core aspiration of the group, a *sine qua non* for the enjoyment of their human rights. It may not be the contemporary reality of the group as a result of intervention by State authorities and settlers, but attachment to a homeland is nonetheless definitive of the identity and integrity of the group, socially and culturally. This may suggest a very narrow but precise definition of "indigenous", sufficient to be applied to any situation where the problem is one of distinguishing an indigenous people for the larger class of minorities. However, there is an implication that the distinction may be merely one of degree and not of quality. Many groups that are identified or self-identify as "minorities" regard themselves as connected with a homeland within the State, or another State.

40. Although aboriginality is perhaps the key factor from the perspective of indigenous peoples, it must be borne in mind that many indigenous peoples in the industrialized countries have changed their human-ecological relationships profoundly, and a majority of them are no longer occupying their ancestral territories. Ancestral lands have retained considerable symbolic meaning and political significance for indigenous peoples, even under the circumstances of industrialization and economic integration that prevail in countries such as the United States and in countries where the distinctions between indigenous peoples and minorities with respect to culture and aboriginality have become more matters of degree.

41. The facts remain that indigenous peoples and minorities organize themselves separately and tend to assert different objectives, even in those countries where they appear to differ very little in "objective" characteristics that distinguished them from the rest of the population of the State. At the same time, no definition or list of characteristics can eliminate overlaps between the concepts of minority and indigenous peoples. Cases will continue to arise that defy any simple, clear-cut attempt at classification.

42. In such cases, a purposive approach would seem appropriate. What are the legal consequences for a group being assigned to one or the other category? Which category is most consistent with the goals and aspirations of the group? Which category is consistent with what can realistically be achieved by the group?

43. Classification as a "minority" or as "indigenous" has very different implications in international law. Both categories of groups possess the right to perpetuate their distinctive cultural characteristics and to be free from adverse discrimination on the basis of those cultural characteristics. Both kinds of groups enjoy the right to participate meaningfully in the social, economic and political life of the State as a whole - as groups if they choose, and in any case without adverse discrimination. **In my opinion, the principal legal distinction between the rights of minorities and indigenous peoples in contemporary international law is with respect to internal self-determination: the right of a group to govern itself within a recognized geographical area, without State interference (albeit in some cooperative relationship with State authorities, as in any federal system of national government).**

44. Some minorities today enjoy limited self-government, either de facto or pursuant to national legislation. Only indigenous peoples are currently recognized to possess a right to political identity and self-government as a matter of international law.

45. The exercise of internal self-determination is impractical where the group concerned is highly dispersed, and lacks a principal centre of population and activity. The territorial element is central to the claims of indigenous peoples, and it should be given particular weight precisely because it is so closely related to the capability of groups to exercise the rights which they assert. On the other hand, minority groups may increasingly make claims to autonomy based on the existence of discrete concentrations of their populations in particular regions of States.

46. Categorization of a situation as a "minority" problem or an "indigenous" problem will serve, at best, as a starting point for the international community to recognize the basic legitimacy of a group's desire for political recognition by a State, and promote a process of political engagement between the group and the State concerned.

47. On the basis of the above-mentioned analysis, the most helpful approach we can take is to clarify our understanding of the "ideal types" of each group (that is, "minorities" and "indigenous peoples"), rather than attempt to define a sharp conceptual boundary between the two groups.

48. Bearing the conceptual problem in mind, I should like to suggest that the ideal type of an "indigenous people" is a group that is aboriginal (autochthonous) to the territory where it resides

today and chooses to perpetuate a distinct cultural identity and distinct collective social and political organization within the territory. The ideal type of a "minority" is a group that has experienced exclusion or discrimination by the State or its citizens because of its ethnic, national, racial, religious or linguistic characteristics or ancestry.

49. From a purposive perspective, then, the ideal type of "minority" focuses on the group's experience of discrimination because the intent of existing international standards has been to combat discrimination, against the group as a whole as well as its individual members, and to provide for them the opportunity to integrate themselves freely into national life to the degree they choose. Likewise, the ideal type of "indigenous peoples" focuses on aboriginality, territoriality, and the desire to remain collectively distinct, all elements which are tied logically to the exercise of the right to internal self-determination, self-government, or autonomy.

50. Obviously there will be cases which satisfy both ideal types of "minorities" and "indigenous peoples" and which merit both kinds of protection. Thus, a group can be "indigenous" yet demand not only some degree of self-determination, but also the right to integrate freely into national society for some purposes. A group that is best characterized as a "minority" may nevertheless possess a limited degree of aboriginality and territoriality, and demand some form of autonomy as a reasonable means of protecting itself from discrimination. The inevitability of overlaps does not invalidate the approach that I am proposing or render it useless in practice. On the contrary, in my view, being practical and realistic necessitates an approach that is purposive, and links the characteristics of groups to their aspirations and to the rights they are entitled to and realistically can exercise.

## Notes

[1] The Convention is binding only on States that have ratified it; 13 States had done so by May 2000.

[2] The report of the working group is contained in document E/CN.4/2000/84.

[3] Article 8(4) of the Minority Declaration.

[4] The "blue water doctrine" hold that the indigenous are those people beyond Europe who lived in the territory before European colonization and settlement, and who now form a non-dominant and culturally separate group in the territories settled primarily by Europeans and their descendants.

[5] The Sami of northern Scandinavia and the Arctic peoples of the Russian Federation are widely held to be indigenous in spite of the fact that they are not covered by the "blue water doctrine". Norway has ratified ILO Convention No. 169 on the understanding that the Sami are indigenous as defined in article 1 of that Convention.

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# COMPREHENSIVE EXAMINATION OF THEMATIC ISSUES RELATING TO RACIAL DISCRIMINATION

## The concept and practice of affirmative action

Preliminary report submitted by Mr. Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission resolution 1998/5

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GE.00-14058 (E)

## Introduction

1. In its decision 1999/105, the Sub-Commission on the Promotion and Protection of Human Rights, recalling its resolution 1998/5 and noting Commission on Human Rights resolution 1999/81 and Economic and Social Council decision 1999/253, decided to renew its authorization to the Special Rapporteur on the concept and practice of affirmative action to request the United Nations High Commissioner for Human Rights to send a questionnaire to Governments, international organizations and non-governmental organizations, inviting them to provide all relevant national documentation on the subject of affirmative action.

2. On 6 June 2000, the questionnaire (annex) was sent by the Office of the United Nations High Commissioner for Human Rights (OHCHR), to Governments, international organizations and non-governmental organizations.

3. As the time available was too short to expect Governments to respond to a questionnaire sent to them, the present preliminary report will contain a first section providing an analysis of international conventions containing provisions relating to the concept of affirmative action and a second section, based mainly on the examination of legal doctrine, on the limits international law sets on affirmative action measures.

## I. THE CONCEPT OF AFFIRMATIVE ACTION IN INTERNATIONAL LAW

4. The concept of affirmative action is generally referred to in international law as "special measures". The first mention of these "special measures" was made by the Government of India during the drafting of the International Covenant on Economic, Social and Cultural Rights (ICESCR). India suggested that an explanatory paragraph should be included in the text of article 2 specifying that:

> "Special measures for the advancement of any socially and educationally backward sections of society shall not be construed as distinctions under this article. Alternatively, the Committee might wish to insert in its report a statement, which would make that interpretation clear."[1]

5. The representative of India pointed out that the implementation of the principles of non-discrimination raised certain problems in the case of the particularly backward groups still to be found in many underdeveloped countries. In his country, the Constitution and the laws provided for special measures for the social and cultural betterment of such groups. Measures of that kind were essential for the achievement of true social equality in highly heterogeneous societies. As he felt certain that the authors of the draft covenant had not intended to prohibit such measures, which were in fact protective measures, he therefore thought it essential to make it clear that such protective measures would not be construed as discriminatory within the meaning of the paragraph. His proposal was withdrawn, although expressly supported by other representatives. However, it was felt that the "difficulty experienced by the Indian representative would best be met by the inclusion of an interpretative statement in the Committee's records, rather than insertion of an additional paragraph in the draft Covenant".[2]

6. According to Craven the ICESCR does not envisage an absolute equalization of result in the sense of achieving an equal distribution of material benefits to all members of society. It does, however, recognize a process of equalization in which social resources are redistributed to provide for the satisfaction of the basic rights of every member of society, based on the idea of equality of opportunity.[3] In its first General Comment, the Committee on Economic, Social and Cultural Rights states that an initial step towards the realization of the Covenant rights is to identify the disadvantaged sectors of the population, which should be the focus of positive State action aimed at securing the full realization of their rights.[4]

7. The idea of equality of opportunity is specifically to be found in articles 7 (c) and 13 (2) (c) of that Covenant. Article 7 (c), in particular, specifies that the only legitimate considerations in achieving equality of opportunity for promotion are seniority and competence. Craven argues that States would appear to be under an obligation to eliminate all other barriers to promotion that might exist both de jure and de facto. In particular, this may require the adoption of positive measures to promote the opportunities of groups in society that are under-represented in higher management positions. Article 13 (2) (c) provides that higher education shall be made equally accessible to all on the basis of capacity. That positive measure may be taken on behalf of certain groups in society is confirmed by the text of article 10 (2) and (3) of the Covenant that provides for special measures of protection to be accorded to mothers before and after childbirth and to children, especially in the workplace.

8. However, Craven further adds that all the articles do appear to rule out the possibility of quotas being imposed in the contexts of promotion in employment and access to higher education. They prohibit advantages being given on grounds other than seniority, competence and capacity. Craven believes, though, that a case could be made for the operation of quota systems in each case on the basis that the terms of the articles are open to "progressive achievement". Thus, a system in which a proportion of places in higher education is set aside for students of a particular group could be justified, if it could be shown that it would ultimately contribute to the achievement of equal access on the basis of capacity at some stage in the future. Even then, that wider concerns of social utility could not be used as justificatory evidence means that the possibilities for imposing quotas with respect to higher education and employment are strictly limited.

9. Particularly interesting also are the general comments of the Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 5 has included "disability" as ground on which special treatment can be justified. An explicit disability-related provision in the ICESCR is absent, probably due to lack of awareness, but in its general comment, the Committee stated clearly:

> "The obligation of States parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all

> persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required."[5]

10. In General Comment No. 13, it is maintained that the adoption of temporary special measures intended to bring out de facto equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination with regard to education, so long as such measures do not lead to the maintenance of unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were taken have been achieved. Therefore, in some circumstances, separate educational systems or institutions for groups shall be deemed not to constitute a breach of the Covenant.[6]

11. When the Third Committee of the General Assembly discussed the non-discrimination provisions of the International Covenant on Civil and Political Rights (ICCPR), the representative of India raised his point again and suggested that article 2 (1) of the ICCPR should be followed by an explanatory paragraph reading: "Special measures for the advancement of any socially and educationally backward sections of society shall not be construed as distinctions under this article."

12. He stated that, owing to past treatment or historical circumstances, a certain sector of the people had to be given greater privileges and protection only for a certain period of time in order to promote the rights of those people to re-establish their equality and conditions under which there would remain no need for such provisions, and equal opportunities would exist for all. If the Committee did not favour the insertion of that paragraph in the draft covenant, a passage of similar content should be included in the Committee's report. The Committee again endorsed the point made by the representative of India and stated that that interpretation, to which there was no objection, should be specially mentioned in the report.[7] The same views were held on article 26.[8]

13. In its general comment on article 26 of the ICCPR, which is a general non-discrimination clause, the Human Rights Committee pointed out that

> "the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant".[9]

14. The practice of the Human Rights Committee confirmed its view on affirmative action. During the consideration of a report of Sweden, it was recalled that article 26 does not only refer to equality before the courts but also to equal protection of the law:

"Article 26 of the Covenant referred not merely to the, as it were, negative or passive aspect of the prevention of discrimination through guarantees of equality before the law - an aspect already covered by article 14 of the Covenant - but also to the positive aspect of 'active protection against discrimination' on the various grounds enumerated."

15. The representative of the Government of Sweden replied that he "agreed that article 26 called for positive action for the elimination of discrimination, and not merely passive measures of prevention".[10]

16. In the case Stalla Costa v. Uruguay, the author complained of the preferential treatment, regarding the reinstatement to the public service of former public officials who had previously been unfairly dismissed on ideological, political, or trade union grounds. The author complained that this preferential treatment unfairly prejudiced his own chances of gaining a public-service job. The alleged discrimination was found to be permissible affirmative action in favour of a formerly disadvantaged group. The Committee considered the Act conferring such preferential treatment to be a "remedy" for persons who had previously suffered from violations of article 26.[11]

17. In Ballantyne, Davidson and McIntyre v. Canada, the Committee found that it was not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English. This protection may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade.[12] Thus, the affirmative action provision in this case was found to go too far, it was disproportionate to its ends.

18. The following inferences can be made on the basis of the two International Covenants. During the drafting of the ICRSCR and the ICCPR, it was generally accepted that a prohibition of discrimination and distinction, respectively, did not preclude positive measures being taken in favour of disadvantaged groups. It was generally agreed that the prohibition was only aimed at distinction of an unfavourable kind lacking any objective or reasonable basis. Moreover, it was also widely accepted that equality did not mean identity of treatment and that there were cases in which the law was justified in making distinctions between individuals or groups.

19. Therefore, according to Thornberry, it can be concluded that the concept of affirmative action is not contrary to the law of the Covenants.[13] In the same vein, Vijapur argues that the principle of non-discrimination in international human rights law clearly implies compensatory unequal treatment of individuals and groups who do not differ from the majority by their nationality, language or religion but only by their social and economic backwardness. He finds support for his conclusion in the inclusion of special protection clauses in human rights instruments.[14] Some authors even believe that the gist of the general comments is that affirmative action to implement the ICCPR's non-discrimination obligations is mandatory.[15] Yet, it should be stressed that neither of the Covenants has explicitly recognized the obligatory nature of affirmative action.[16] Nor are the form of affirmative action and situation in which such action must be taken defined, owing to the complexity of the issue.

20. The International Labour Organization (ILO) has been a pioneer in using mainly promotional conventions to realize defined objectives and policies. The ILO has also set out

standards to be achieved, consequent with the principle of equal remuneration for work of equal value, incorporated into the ILO Constitution, and of equality of all human beings, irrespective of race, creed or sex, as proclaimed in the 1944 Declaration Concerning the Aims and Purposes of the ILO, adopted by the International Labour Conference at Philadelphia.

21. The ILO Discrimination (Employment and Occupation) Convention of 1958 (No. 111), which was chiefly aimed at racial discrimination but is applicable to other forms of discrimination as well, engages each member State to undertake to pursue a national policy designed to promote equal opportunities and treatment in respect of employment and occupation with a view to eliminating any discrimination, enacting legislation to that effect and seeking the cooperation of employers' and workers' organizations and other appropriate bodies (arts. 2 and 3). Article 5 is one of the first articles in an international treaty to permit explicitly "special measures of protection or assistance" designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural states, are generally recognized as requiring special protection or assistance. It is clearly stated that these special measures will not constitute discrimination.

22. In 1960, a similar Convention relating to the field of education was adopted in the framework of UNESCO. The UNESCO Convention against Discrimination in Education singles out, in its article 1, as a discriminatory act the establishing or maintaining of separate educational systems. Article 2, however, qualifies that prohibition. It allows: (i) separate educational systems set up for pupils of the two sexes on an equivalent basis; (ii) educational systems separated for religious or linguistic reasons, offering an education which is in keeping with the wishes of the pupil's parent or legal guardians, on an optional basis and if the education provided conforms to certain standards; (iii) private educational institutions, if their object is not to exclude any group but to provide educational facilities in addition to those provided by the public authorities, under certain conditions. This article does not refer to special measures of favourable discrimination, but only determines when separate educational systems will not be deemed to constitute discrimination. Moreover, it does not explicitly provide for special public schools.

23. Article 5 of the same Convention relates to the right of members of national minorities to carry on their own educational activities, such as the teaching of their own language, provided that this right is not exercised in a manner which prevents the members of those minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty. The standard of such education should not be lower than the general standard and attendance at such schools should be optional. States parties have to undertake all necessary measures to ensure the application of this right, but there is no suggestion that the State is obliged to provide financial or other assistance to the group. Thornberry labels this a case of negative rather than positive freedom.[17] The travaux préparatoires also indicate that special measures aimed at meeting special requirements of persons in particular circumstances, such as backward children, the blind, immigrants and illiterate populations, were not "unjustified" preferences, but would rather raise deprived persons to a condition of genuine equality.[18]

24. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) adopted in 1966, deals in paragraph 4 of article 1 with what was called "favourable discrimination": measures taken in favour of certain racial or ethnic groups or individuals in order to ensure to them equal enjoyment or exercise of human rights and fundamental freedoms

> "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

25. This paragraph should be related to article 2, paragraph 2, of the same Convention which imposes on States parties the duty to take special measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. It was underlined that protection of certain groups did not constitute discrimination, provided that such measures were not maintained after the achievement of the aims for which they had been taken.

26. Both articles find their origin in article 2, paragraph 3, of the United Nations Declaration on the Elimination of all Forms of Racial Discrimination adopted in 1963. The reason that the Convention deals twice with the same problem is that while article 1 defines discrimination and its paragraph 4 refers to a case in which the application of different treatment should not be deemed discriminatory, article 2 relates to duties which are imposed by the Convention on States parties; both insist upon the temporary character of the special measures, a reaction that was inspired by the then existing system of apartheid. In the debate on the paragraph on special measures, some representatives were concerned that special measures could be used as a weapon by Governments anxious to perpetuate the separation of certain groups from the rest of the population, or to justify colonialism. However, it was made clear that the aim should not be to emphasize the distinctions between different racial groups, but rather to ensure that persons belonging to such groups could be integrated into the community, in order to attain the objective of equal development for all citizens.[19]

27. An application of article 1, paragraph 4, was made in the Australian case of Gerhardy v. Brown, where the 1978 Pitjantjatjara Land Rights Act was disputed as being racial discrimination.[20] The Land Rights Act aimed to prevent any person other than a Pitjantjatjara entering the Pitjantjatjara land, in the north-west of South Australia, without a permit from the corporate body of the Pitjantjatjara. The defendant Brown was an Aborigine, though not a Pitjantjatjara and thus not permitted to enter. The Australian High Court held that there was no discrimination, because the Land Rights Act was deemed to be a special measure within the meaning of article 1, paragraph 4, of the ICERD. However, five of the seven judges held that in the absence of article 1, paragraph 4, the provisions would have been discriminatory because they made a distinction between Pitjantjatjara and non-Pitjantjatjara, one element of which was the proposition that to be Pitjantjatjara was to be a member of a race. Thus, the judges rejected

the argument that the Land Rights Act merely recognized traditional ownership and was therefore not discriminatory on the basis of race but a reasonable response to a traditional relationship with land.

28. According to Brown, the Australian judges treated article 1, paragraph 1, of the ICERD as being very much a prohibition on any formal discrimination by reference to a criterion containing any element of race irrespective of its "legitimacy".[21] It follows that any provision containing notions of aboriginality will be prima facie discriminatory unless it can be categorized a "special measure". But, according to Brown, the fact that a primary criterion involves a reference to race does not make the rule discriminatory in law, provided the reference to race has an objective basis and a reasonable cause. It is only when the reference lacks a reasonable cause and is arbitrary that the rule concerned becomes discriminatory in the legal sense. In the case of the traditional ownership rights of the Pitjantjatjara, however, two other criteria were relevant, that of tribal origin and that of traditional ownership. The fact that this traditional ownership is peculiar to a particular group of Aborigines does not make recognition of such land rights discriminatory. The legal recognition has an objective basis; it is not arbitrary and is discriminatory only in the sense that a reasonable and legitimate policy coincides with racial origin. Secondly, the modalities of the different treatment must not be disproportionate in effect to other groups. This is a matter of assessment in relation to particular facts, specifically in the case of recognition of land rights, where the restriction on freedom of movement raises the issue of proportionality. In other words, Brown maintains, even when the different treatment is not discriminatory in a legal sense, the modalities, and the method of implementation, may be unreasonable and hence discriminatory at the second level.

29. The Seminar on the elimination of all forms of racial discrimination, held in 1968, undertook an important discussion on the legitimacy of reservations and quotas. According to one view, reservations and quotas were a fundamental means of promoting equality in law and in fact for persons who had been victims of discrimination, but others believed that it would be preferable to make special facilities available to backward groups in order to enable them to meet the general standards of merit. Though the second view is attractive, systems of reservations and quotas are not necessarily inconsistent with the principle of equality, as long as they are of a strictly temporary nature and are maintained no longer than is necessary to achieve the objectives for which they are imposed, i.e. the rescue of backward groups from their economic and cultural disabilities. The crucial point was made that although under certain circumstances reservations and quotas may be appropriate, they must always be of limited duration.[22]

30. The importance of the UNESCO Declaration on Race and Racial Prejudice of 1978, although only a declaration, cannot be underestimated as it was widely supported, being adopted unanimously by acclamation. It is considered to have become part of the international law of human rights, being a comprehensive international instrument that deals with the protection of cultural and group identity and the value of diversity. In article 1 of the Declaration, it is stated that all individuals and groups have the right to be different, to consider themselves as different and to be regarded as such. The right to be different should not, however, serve as a pretext for racial prejudice nor justify discriminatory practices, nor provide a ground for the policy of apartheid. Article 9, paragraph 2, requires that special measures be taken to ensure equality in dignity and rights for individuals and groups wherever necessary, while ensuring that they are

not such as to appear racially discriminatory. This article does not mention "adequate advancement" as an aim of special measures, which makes the Declaration a bit less paternalistic and shows due respect to different groups.

31. The article further states that particular attention should be paid to racial or ethnic groups which are socially or economically disadvantaged, so as to afford them, on a completely equal footing and without discrimination or restriction, the protection of the laws and regulations and the advantages of the social measures in force, in particular in regard to housing, employment and health and to facilitate their social and occupational advancement, especially through education.[23] The fact that the article refers explicitly to social and economic measures is new; moreover, these measures also involve an obligation to respect the authenticity of the culture and values of the persons who are the object of the measures. In the same vein, the preamble strongly opposes any form of assimilation. The innovative aspect of this Declaration is that it asserts the need for affirmative action and at the same time recognizes the right to be different.

32. The Convention on the Elimination of All Forms of Discrimination against Women of 1979 had a precedent in article 3 of the International Covenants:

> "The States Parties to the present Covenant undertaken to ensure the equal right of men and women to the enjoyment of all economic, social and cultural (civil and political) rights set forth in the present Covenant".

33. Many representatives thought that this article was merely a duplication of the general non-discrimination clauses in article 2 of the ICCPR and of the ICESCR, and in article 26 of the ICCPR. It was pointed out, nevertheless, that article 3 did not merely state the principle of equality but enjoined States to make equality an effective reality.[24] As such, the Human Rights Committee asserted in its General Comment No. 4 that article 3, like articles 2 (1) and 26 insofar as those articles primarily deal with the prevention of discrimination on a number of grounds, of which sex is one, requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights. This cannot be done by simply enacting law.[25]

34. In 1975 the ILO adopted a Declaration on Equality of Opportunity and Treatment for Women Workers.[26] Article 2, paragraph 2, states unambiguously that positive special treatment during a transitional period aimed at effective equality between the sexes shall not be regarded as discriminatory.[27] According to MacKean, this formulation neatly summarizes the thesis that true equality sought by international instruments does not necessarily require identical treatment of all, but that special ameliorative measures are perfectly consistent with equality and do not constitute discrimination so long as they are not continued after the need has disappeared. In the same vein, UNESCO decided in 1979, in view of the handicaps facing girls and women, that until "full equality" of education and training opportunities was assured, there was a need for special programmes for girls and women, so as to enable them to reduce and eventually eliminate the gap.[28]

35. During the drafting of the Convention on the Elimination of All Forms of Discrimination against Women (hereafter "Women's Convention") the question of special measures was

discussed. It was emphasized that the establishment of temporary conditions for women aimed at establishing de facto equality should not be considered discriminatory. Article 4 provides explicitly:

> "1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
>
> "2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory."

36. That this article was controversial appears from the reactions of France and the United Kingdom who insisted that the Convention should in no way require Governments to impose "reverse discrimination", by which they meant "discrimination in favour of women", since - save in certain carefully defined circumstances - this would represent a permanent departure from the objective of equal status and opportunities and would not be in the long-term interest of women themselves. On the other hand, the Convention should permit, but not require, temporary affirmative action measures in special fields to equalize opportunities for women in situations where it was necessary to overcome an undesirable historical link. States admitted that although this might appear to be discriminatory, it was necessary to right wrongs done against women in the past because of their sex. However, it was stressed that this should be seen essentially as a temporary measure which in the long term should become unnecessary.[29]

37. Problematic for some States were also the special protection measures concerning maternity. Some States felt that one's physical constitution was not a matter of sex but something that applied to both women and men. MacKean considers that the controversy was due to widespread confusion over terminology: "If 'equal treatment' always means the 'same' or 'identical' treatment, then of course special measures are unequal, but if equality is used in a normative sense then the difficulty disappears. Similarly, if discrimination means unjustifiable or unreasonable differentiations then the question arises whether certain measures are objectively justifiable. This can easily be shown for measures designed to protect women's physiological function, particularly childbearing, but as the ILO has shown, it is increasingly recognized that measures designed to protect women as such because of their physical nature might equally well be applied to some men."[30] Moreover, there was a lack of consensus during the drafting as to whether a convention should deal with equality between men and women or the elimination of discrimination against women.

38. Vogel-Polsky stated in her study, commissioned by the Steering Committee for Equality between Men and Women of the Council of Europe (CDEG), that States that had become parties to the Convention without making reservations on article 4 not only bound themselves to eliminate discrimination against women, but also took upon themselves the obligation to restore the balance between men and women in every aspect of social life through appropriate measures, more specifically affirmative action.[31] However, this position appears rather extreme. From the travaux préparatoires and the intention of the authors, it is important to note that this convention

is promotional and programmatic and does not impose immediately binding legal obligations. Article 4 merely creates the possibility to achieve de facto equality through affirmative action, and acknowledges that affirmative action is not to be considered discriminatory.[32] The Committee on the Elimination of All Forms of Discrimination against Women, nevertheless, took note of the still present need for action to implement fully the Convention by introducing measures to promote de facto equality between men and women. It recommended States parties to make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment.[33]

39. The subsequent articles of the Women's Convention guaranteeing diverse rights stipulate each in an intentionally repetitive way that member States shall take "all appropriate" measures. Vogel-Polsky argues that because the Convention refers to "all appropriate measures" in an obligatory manner, it renders the "temporary special measures" referred to in article 4 not only indispensable but, combined with the fact that the Convention seeks equality in fact, the most appropriate measures to use. Vogel-Polsky maintains that this interpretation of the relationship between the various rights in the Convention and article 4 (which universally sanctions affirmative action) is directly inspired by the principle of "appropriate or full effect" ("effet utile") of international law.[34] The CEDAW seems to agree with this interpretation.

40. In its General Recommendation No. 23 on political and public life the Committee refers to temporary special measures in the following way:

> "While removal of de jure barriers is necessary, it is not sufficient. Failure to achieve full and equal participation of women can be unintentional and the result of outmoded practices and procedures which inadvertently promote men. Under article 4, the Convention encourages the use of temporary special measures in order to give full effect to articles 7 and 8. Where countries have developed effective temporary strategies in an attempt to achieve equality of participation, a wide range of measures [have] been implemented, including recruiting, financially assisting and training women candidates, amending electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas and targeting women for appointment to public positions such as the judiciary or other professional groups that play an essential part in the everyday life of all societies. The formal removal of barriers and the introduction of temporary special measures to encourage the equal participation of both men and women in the public life of their societies are essential prerequisites to true equality in political life. In order, however, to overcome centuries of male domination of the public sphere, women also require the encouragement and support of all sectors of society to achieve full and effective participation, encouragement which must be led by States parties to the Convention, as well as by political parties and public officials. States parties have an obligation to ensure that temporary special measures are clearly designed to support the principle of equality and therefore comply with constitutional principles which guarantee equality to all citizens."[35]

## II. LIMITS SET ON AFFIRMATIVE ACTION MEASURES

41. International law sets major limits on affirmative action measures. These are:

(a) Affirmative action measures may not lead to discrimination;

(b) Affirmative action measures need to be temporary.

### A. The prohibition of non-discrimination

42. Of particular importance when assessing affirmative action measures is their relationship with the principle of non-discrimination, which is the reverse formulation of the principle of equality and one of the most - if not the most - fundamental human rights. The principle of equality has been solemnly affirmed in the 1948 Universal Declaration of Human Rights, which states, "All human beings are born free and equal in dignity and rights", and in Article 1 of the Charter of the United Nations which asserts as one of the goals of the Organization "to achieve international cooperation (...) in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". A similar provision is contained in all the human rights instruments of the international regional systems, such as the Council of Europe, the Organization of American States and the Organization of African Unity.

43. Non-discrimination is primarily a legal technique employed to counteract unjustified inequality, founded on the idea that a State may not legitimately disadvantage an individual on an arbitrary basis.[36] The prohibition of discrimination can be found in all international instruments.

44. Non-discrimination and affirmative action if not carefully framed may clash with each other. Where the non-discrimination principle removes factors such as race, gender, nationality, etc. from the society's decision-making processes, affirmative action seeks to ensure full and substantive equality by taking those factors into account.[37] However, affirmative action, in its desire to achieve equality, can sometimes use extreme measures and thereby violate the non-discrimination principle. Therefore, affirmative action policies must be carefully controlled and not be permitted to undermine the principle of non-discrimination itself. In order to understand when affirmative action becomes discrimination, it is worth while having a close look at the travaux préparatoires of several international instruments containing non-discrimination principles.

45. During the preparation of the non-discrimination provision in article 7 of the Universal Declaration, the Chairman of the United Nations Commission on Human Rights, Eleanore Roosevelt, stated that equality did not mean identical treatment for men and women in all matters, for there were certain cases where differential treatment was essential. This was a clear reaffirmation of the idea that "equality" was not only to be understood in its normative sense but also in its formal sense.[38] According to Lauterpacht, it implies equality relative to the situation.[39]

46. The ambiguous terminology in the non-discrimination provisions of international human rights, which have used the terms "distinction" and "discrimination" interchangeably to cover the same concept, has created great confusion.[40] For example, there is an inconsistency in article 2 of the International Covenants: the International Covenant on Economic, Social and Cultural Rights guarantees that "the rights enunciated in the present Covenant will be exercised without discrimination of any kind", whereas the International Covenant on Civil and Political Rights guarantees "the rights recognised in the present Covenant without distinction of any kind".

47. Article 14 of the English version of the European Convention on Human Rights states: "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status", while the French version uses the term "distinction".

48. Although no explicit explanation is offered in the travaux préparatoires for these inconsistencies, it should be admitted that, whatever word was used, the drafters intended to include in both Covenants and in the European Convention the same level of protection. Both terms clearly exclude only "discrimination" understood as "arbitrary" or "unjust distinction".

49. The concept that not all distinctions are unlawful was crucial during the drafting of article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights, where an overwhelming majority endorsed a three-Power amendment (Argentina, Italy and Mexico) to replace the word "distinction" with the word "discrimination".[41] The stated purpose was to confirm that certain distinctions might be justified to promote the position of certain backward and underprivileged sectors of the population.

50. Similarly, in its General Comment on article 26, the general non-discrimination principle of the International Covenant on Civil and Political Rights, the Human Rights Committee added that "the enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance" and that "not every differentiation of treatment will constitute discrimination".[42]

51. In the same vein, the European Court of Human Rights affirmed in the Belgian Linguistics case that:

> "In spite of the very general wording of the French version ('sans distinction aucune'), article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognised. This version must be read in the light of the more restrictive text of the English version ('without discrimination')."[43]

52. The concept of non-discrimination has further been clarified by a number of studies carried out by special rapporteurs of the Sub-Commission.[44] Modern legal doctrine makes the following conclusions:

(a) Nowadays, it is universally accepted that the term "discrimination" has to be reserved for arbitrary and unlawful differences in treatment.[45] "Distinction", on the other hand,

is a neutral term, which is used when it has not yet been determined whether a differential treatment may be justified or not. The term "differentiation", on the contrary, points to a difference in treatment, which has been deemed to be lawful,[46]

(b) Consequently, not every different treatment is prohibited - only those treatments that result in discrimination. This raises the question of when differential treatment becomes unacceptable, or when a distinction of any kind can be justified.[47]

53. International courts and authors looked for criteria which enabled a determination to be made as to whether or not a given difference in treatment contravened the non-discrimination principle.

54. In the South West Africa cases, Judge Tanaka affirmed that equality being a principle and different treatment an exception, those who refer to the different treatment must prove its raison d'être and its reasonableness; it must not be given arbitrarily but be in conformity with justice.[48]

55. In the Belgian Linguistics case, the European Court, following principles which may be extracted from the legal practice of a large number of democratic States, held that

> "the principle of equality is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."[49]

56. These principles have been repeatedly applied in a great number of later cases.[50]

57. The United Nations Human Rights Committee has followed the European Court of Human Rights in its position, and declared in its views and General Comment No. 18 that:

> "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".[51]

58. Various authors have also analysed the different constitutive elements of discrimination.[52] One of these elements is the ground on which the distinction is based. The enumeration of the prohibited grounds in general human rights instruments is non-exhaustive. This follows clearly out of the enlargement of the four grounds enumerated in the Charter (race, language, religion and sex) to the 12 grounds in the Universal Declaration of Human Rights and both Covenants, to the 13 grounds in the European Convention on Human Rights, as well as from the use of the words "such as" which precede the enumeration of these grounds.

59. Consequently, a distinction based on another ground can be arbitrary and some distinctions based on some of the enumerated grounds are not necessarily illegitimate. The ground on which a distinction is based is nevertheless important in determining whether the

distinction is arbitrary or not. However, it is not the ground itself that is decisive, but the relationship or the connection between the ground and the right on which the distinction is practised. There needs to be a "sufficient connection" between the right and the ground or, in other words, the ground has to be deemed "relevant" for the specific right in which the distinction is practised. The general aim or the goal pursued by the legislation in question is not decisive, but the relevance of the particular ground with respect to the particular rights is. A distinction introduced by legislation in the pursuit of a perfectly legitimate goal can nevertheless be discriminatory - and as such constitute a violation of human rights - if the ground on which the distinction is based cannot be deemed relevant to the right in question.

60. Replacing the notion of "irrelevant" by the notion of "arbitrary" is not just substituting one word for another. The difference lies in the level at which the illegitimate character of the distinction has to be assessed. If this level were to be situated in relation to the general aims and goals of the legislation, the assessment would be purely political and inappropriate for judicial determination. The whole point, however, is that a legal rule is not necessarily legitimate because it pursues a legitimate goal. The law as a technique used to attain certain goals has to respect certain inherent requirements. The most fundamental of these is the respect of the equality principle, which prohibits the introduction of distinctions based on grounds which are irrelevant for the particular right or freedom.

61. While still requiring a value judgement, which can be influenced by political considerations, the evaluation of the relevance of the ground by assessing the connection between this ground and the right or freedom concerned remains a judicial act. The previous identification of the ground (on which the distinction is based) and of the matter (in which the distinction is practised) as a right reduces the political element to a strict minimum and safeguards the judicial character of the evaluation. The approach should not be basically different when evaluating distinctions introduced in the framework of a policy of "affirmative action".

62. There is no doubt that special measures may be necessary in order to ensure full equality for categories of the population which, sometimes for centuries, have suffered from a disadvantaged position in society. But it should be clear that not every measure taken in pursuit of such a policy should be accepted as legitimate regardless of the ground of distinction made or the nature of the right conferred. Even if it is established that the distinctions made in the framework of an affirmative action policy are based on the same ground as the one which was the basis of previously unequal situations, the legal rules concerned should still be subject to the equality test.

63. The simple fact that a particular category of the population has suffered from disadvantaged economic or social conditions does not mean that in order to upgrade its material position any distinction based on the characteristic defining the group should be considered legitimate, even if this ground is irrelevant as a basis of distinction with regard to a particular right. It would not be justifiable to provide special social benefits to persons who do not need them but who belong to the category which used to be in a disadvantaged condition, and to refuse the same benefits to persons who do need them but belong to the category which previously enjoyed better conditions in society.

64. Affirmative action should be centred on taking measures expected to meet the particular needs of the category it is intended to favour, rather than on restricting the benefits of the measures on the basis of the element which distinguishes that category from the other members of the population, but which is not relevant for the right concerned. It is in choosing the measures, their timing and their location that the policy can favour the target category, without violating the rights - including their right to equal protection of the law without discrimination - of persons not belonging to that category. In no case may someone be deprived of a basic right under the pretext that doing so would help particularly disadvantaged groups better to overcome the consequences of previous discrimination.[53]

65. An affirmative action programme provision should not be interpreted as justifying any distinction based on any ground with respect to any right merely because its object is the amelioration of disadvantaged individuals or groups. Such an interpretation would justify absurd legislation in total disrespect of human rights and its fundamental principle of equality or non-discrimination.

B. Affirmative action measures need to be temporary

66. The requirement of "limited duration" of special measures has been continually stressed in international law. It has been maintained that although the acceptance of affirmative action is not contrary to international law, it does not allow ignoring the limits of affirmative action sanctioned by the Covenants.[54] The granting of affirmative action measures may not as a consequence lead to the maintenance of unequal or separate standards and they shall be discontinued after the objectives for which they have been taken have been achieved.[55]

67. It is absolutely to be avoided that affirmative treatment would lead to stigmatization or to a situation of "separate but equal", a doctrine previously used in the United States according to which Blacks were given the same rights as Whites but were forced to exercise these rights in isolation, or, worse, to a new apartheid.[56] The "limited duration" requirement reveals the difference between two overlapping notions in international law, i.e. the "protection of minorities" and "prevention of discrimination".

68. Obviously, both minorities and disadvantaged groups can appeal to the non-discrimination principle protecting them against discrimination by reference to their race, colour, descent, national or ethnic origin, language. Likewise, they can be both beneficiaries of special measures, under the conditions mentioned, i.e. limited duration and the measures must not lead to discrimination themselves, to overcome past discriminatory treatment or structural discrimination.

69. However, it is clear that special measures of this kind are not sufficient to cover the issues raised regarding the exercise of the rights of persons belonging to minorities to enjoy their own culture, to profess and practise their own religion, or to use their own language. The exercise of these rights requires permanent measures of protection taken by States, which is a wider notion.

70. The concept of "protection of minorities" is one the oldest concerns of international law, finding its origin in the rise of the nation-State in the sixteenth and seventeenth centuries, which

necessitated consideration for minority groups.[57] Many treaties were concluded for the benefit of specific groups, for example the Treaty of Paris of 30 March 1856 which contains provisions referring to the protection of Christian minorities in the Ottoman Empire. The Treaty of Berlin of 13 July 1878 is of particular interest because of the special legal status it accorded to some religious groups. The protection in these treaties was only partial and no machinery was established. Nevertheless, they served as a model for the "minorities system" that was subsequently established within the framework of the League of Nations.[58]

71. The treaties concluded under the "minorities system" were complex in their wording, but a survey of their provisions shows that they envisaged two aims:[59]

1. The principle of non-discrimination guaranteed nationals belonging to racial, linguistic or religious minorities enjoyment of the same treatment in the exercise of civil and political rights.

2. The principle that persons belonging to minority groups should be guaranteed a number of special rights which enabled the minorities to preserve and develop their national culture and consciousness. In particular, they had an equal right to establish schools and religious, charitable or social institutions at their own expense. They could use their own language, even in court, and freely exercise their own religion. Further, in towns and districts where there was a considerable proportion of citizens speaking a language other than the official language of the State, adequate facilities were to be provided for instruction to be given in that language to the children of such nations in primary school. Finally, the treaties provided that in those towns and districts where there was a considerable proportion of nationals of the country belonging to racial, religious or linguistic minorities, they were assured an equitable share in the enjoyment and application of the funds which might be provided out of public Treasury under the State, municipal or other budgets for educational, religious or charitable purposes. Some treaties also mentioned a limited right to autonomy.

72. Thus, the idea underlying the minority treaties signed within the framework of the League of Nations was twofold: to allow minorities to live alongside the rest of the population in a position of equality, and to preserve the characteristics and the separate identity of minorities.

73. Important case law on these special rights was developed by the Permanent Court of International Justice, which affirmed this double-track system. Five cases were submitted by the League Council to the Permanent Court for advisory opinions: three concerning German minorities in Poland, one concerning the Polish minority in Danzig and one concerning the Greek minority in Albania.

74. The judgement of the Court on the Minority Schools in Albania case is of great significance. The dispute originated with an amendment that was introduced into the Albanian Constitution whereby all private schools were abolished throughout the country. The Greek minority maintained that the amendment was in violation of the Albanian Declaration of 1921

concerning the protection of minorities. The Government of Albania contended that, since the abolition of the private schools constituted a general measure applicable to the majority as well as the minority, it was in conformity with the Declaration.

75. More in general, the Permanent Court stated:

> "Equality in law precludes discrimination of any kind: whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations. It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact ... . The equality between members of the majority and of the minority must be an effective, genuine equality."[60]

76. As for the private schools of the Greek minority in Albania, the Court pronounced:

> "The institutions mentioned are indispensable to enable the minority to enjoy the same treatment as the majority, not only in law but also in fact. The abolition of these institutions, which alone can satisfy the special requirements of the minority groups, and their replacement by government institutions, would destroy this equality of treatment, for its effect would be to deprive the minority of the institutions appropriate to its needs, whereas the majority would continue to have them supplied in the institutions created by the State."

77. Because history showed that States such as Germany relied upon these minority provisions in the treaties to intervene militarily, most of the peace treaties signed after the Second World War contained non-discrimination clauses. Only a few treaties contained clauses protecting minorities, as the abuse of the minority treaties by Germany - and the consequent failure of the League of Nations - had left minority clauses with a poor reputation.

78. The emphasis in the protection of human rights shifted from group protection to the protection of individual rights and freedoms. The new approach applied only the non-discrimination principle, which meant that whenever someone's rights were violated because of a group characteristic, be it race, religion, nationality, etc., the matter was to be taken care of by protecting the rights of the individual on a purely individual basis. The principle of equality and the premise of non-discrimination became fundamental principles, enshrined in every human rights text written after the Second World War. This new approach was fully integrated in the establishment and workings of the United Nations. However, the notion of protection of minorities was still used in some international instruments.

79. At the first session in 1947 of the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, a discussion was held on the meaning of the terms "prevention of discrimination" and "protection of minorities".[61] It was indicated that there was a fundamental difference between them. "Discrimination" implied any act or conduct that denied to individuals or groups of people the equality of treatment they may wish. Protection of minorities was described as the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the

majority of the population. The protection belongs equally to individuals belonging to such groups and wishing the same protection. It follows that differential treatment of such groups or individuals belonging to such groups is justified when it is exercised in the interest of their contentment and the welfare of the community as a whole.

80. The notion of "protection of minorities" was further elaborated in a memorandum by the Secretary-General entitled, "The Main Types and Causes of Discrimination"[62] He argued that the protection of minorities, although similarly inspired by the principle of equality of treatment of all peoples, required positive action, such as establishment of schools where education is given in the native tongue, whenever the minorities concerned wished to maintain their difference of language and culture.[63]

81. The Secretary-General further maintained that while the goal of protection of minorities seems to differ from that of the prevention of discrimination, in reality there is no contradiction in aiming simultaneously at the protection of minorities and the prevention of discrimination. Indeed, in each case it is desired to obtain and effectively maintain equality of treatment of all peoples. Prevention of discrimination and the protection of minorities represent different developments of the same idea of equality of treatment for all peoples. One required the elimination of any distinction imposed, whereas the other required safeguards to preserve certain distinctions voluntarily maintained.

82. In his report on Protection of minorities, A. Eide[64] offered affirmative action as a solution to problems regarding minorities. However, he added that affirmative action can lead to group conflict, for which reason such measures should not be continued beyond the time when equality has been achieved.[65]

83. Affirmative action measures are temporary and compensatory, aimed at correcting conditions that impair the enjoyment of equal rights, while protective measures for minorities aim at conserving a group's identity.[66]

## Notes

[1] United Nations document A/C.3/SR.1182, para. 17.

[2] United Nations document A/C.3/SR.1183, paras. 12 and 29.

[3] M. Craven, The International Covenant on Economic, Social and Cultural Rights, a perspective on its development, Oxford, Clarendon Press, 1995, p. 158.

[4] Committee on Economic, Social and Cultural Rights, General Comment 1, para. 3, in United Nations document HRI/GEN/Rev.4 (2000).

[5] Ibid., General Comment No. 5, para. 9.

[6] Ibid., General Comment No. 13, paras. 32-33.

[7] United Nations documents A/C.3/SR.1257, para. 18; A/C.3/SR.1258, paras. 18, 38, 45, 47 (UAR); A/C.3/SR.1259, para. 33. See M. Bossuyt, Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights, Dordrecht, Martinus Nijhoff Publishers, 1987, p. 55.

[8] United Nations document E/CN.4/SR.122, pp. 8 and 11.

[9] Human Rights Committee, General Comment No. 18, para. 10, in HRI/GEN/1/Rev.4 (2000).

[10] United Nations document CCPR/C/SR.189, paras. 15-16. J.J. Paust ("The permissibility of affirmative action in higher education under human rights law", New York City Law Review, 1998, pp. 95-96) agrees that "equal protection" should be interpreted in a manner that allows for certain measures of affirmative action to promote an "equal" and effective "protection" against ongoing discrimination.

[11] Communication No. 198/1985, in Selected Decisions of the Human Rights Committee Under the Optional Protocol, vol. 2 (United Nations publication, Sales No. E.89.XIV.1).

[12] Communication No. 385/1989, in Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40), vol. II, annex XII, sect. P.

[13] P. Thornberry, International Law and the Rights of Minorities, Oxford, Clarendon Press, 1991, p. 284. Referring to article 1 (4) of the International Covenant on the Elimination of All Forms of Racial Discrimination and article 4 (1) of the Convention on the Elimination of All Forms of Discrimination against Women, which do contain explicit statements about the legitimacy of affirmative action measures, he points out that a contrary interpretation in the context of the Covenants would display an "extraordinary lack of congruence".

[14] A.P. Vijapur, "The principle of non-discrimination in international human rights law: the meaning and scope of the concept", India Quarterly, A journal of international affairs, 1993, p. 91.

[15] A.F. Beyafsky "The principle of equality or non-discrimination in international law", Human Rights Law Journal, 1990, p. 27; Lord Lester of Herne Hill and S. Joseph, "Obligations of non-discrimination", in D. Harris and S. Joseph, (eds.), The International Covenant on Civil and Political Rights and the United Kingdom Law, Oxford, Clarendon Press, 1995, p. 579.

[16] While recognizing this, M. Craven (op. cit., at note 3, p. 186) argues that, although the Committee on Economic, Social and Cultural Rights implicitly recognizes an obligation through the requirement that States concentrate upon the situation of vulnerable and disadvantaged groups in society, this is nevertheless a matter that ideally should be made clear in a future general comment.

[17] Thornberry further states that this is reinforced by article 3 (d) of the Convention by which States undertake "not to allow, in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils

belong to a particular group". He believes that the equality and non-discrimination promised by the Convention to minority groups is the equality and non-discrimination provided for the community as a whole, without regard to cultural differences. In any dispute involving an abuse of rights arising from an interpretation of the Convention, the balance is clearly in favour of the State, which can find ample scope to deny their practical exercise. P. Thornberry, op. cit., at note 13, pp. 289-290. He refers also to UNESCO General Conference document 11C/15 (see E/CN.4/Sub.2/210) according to whose analysis article 5 does not support the notion that States are obliged to provide public or publicly supported schools.

[18] UNESCO document 11C/15, annex III, para. 36 and E/CN.4/Sub.2/210, annex III, para. 13.

[19] See N. Lerner, The UN Convention on the Elimination of All Forms of Racial Discrimination, Alphen aan den Rijn, Sijthoff and Noordhoff, 1980, pp. 32-39. P. Thornberry, op. cit., at note 13, pp. 265-268. India especially expressed strong support for the inclusion of special measures in the Covenant and referred to its own domestic situation, where the Constitution of India expressly authorizes special measures to protect backward groups, i.e. the Scheduled Castes and Scheduled Tribes.

[20] (1985) 57 ALR 472.

[21] I. Brown, "The rights of peoples in modern international law", in J. Crawford, The rights of peoples, Oxford, Clarendon Press, 1988, pp. 8-10.

[22] See United Nations document ST/TAO/HR.34, paras. 147-155.

[23] See also article 5, paragraph 2, which points out the duties of States in education against racism and contains a clause on general affirmative action: States should take "appropriate steps to remedy the handicaps from which certain racial or ethnic groups suffer with regard to their level of education and standard of living and in particular to prevent such handicaps from being passed on to children".

[24] M. Bossuyt, op. cit. at note 7, pp. 75-79. The same arguments were used by those who considered a specific convention on women unnecessary in view of the texts already in existence. MacKean comments: "Some representatives considered that the paragraph might be taken to decree an 'absolute' or 'precise' equality or 'identity of treatment' but others urged that what was being sought was an effective equality in fact - not the abolition of differences between the roles of men and women in marriage, but rather the equitable differences of rights and responsibilities." There was certainly a feeling that de facto equality should be increased. As such, the representative of the USSR commented that the Third Committee was "elaborating principles of de jure equality; from these principles would arise the de facto equalization of human rights". He continued, "equality of rights went further than mere non-discrimination; it implied the existence of positive rights in all the spheres dealt with in the draft Covenant". W. MacKean, Equality and Discrimination under International Law, Oxford, Clarendon Press, 1983, p. 182.

[25] Human Rights Committee, General Comment No. 4, para. 2, in HRI/GEN/1/Rev.4 (2000).

[26] Adopted on 25 June 1975 by the 60th Session of the International Labour Conference. See United Nations document E/CN.6/603.

[27] The ILO had already undertaken efforts concerning equal remuneration for work of equal value. See ILO Equal Remuneration Convention, 1951 (No. 100), I. Brownlie, Basic documents on human rights, Oxford, Clarendon Press, 1981, p. 200.

[28] See United Nations document E/CN.6/632, para. 92.

[29] L.A. Rehof, Guide to the "Travaux Préparatoires" of the United Nations Convention on the Elimination of All Forms of Discrimination against Women, Dordrecht, Martinus Nijhoff Publishers, 1993, pp. 66-76.

[30] W. MacKean, op. cit. at note 24, pp. 190-191.

[31] E. Vogel-Polsky, Les actions positives et les contraintes constitutionelles et legislatives qui pèsent sur leur mise en oeuvre dans les Etats membres du Conseil de l'Europe.

[32] See also A.W. Heringa, "Voorkeursbehandeling en moederschap", in A.W. Heringa, J. Hes and L. Linjnzaad, Het Vrouwenverdrag: een beeld van een verdrag ..., Antwerpen, Maklu, 1994, pp. 33-34.

[33] Committee on the Elimination of Discrimination against Women, General Recommendation No. 5, Temporary special measures, in HRI/GEN/1/Rev.4 (2000).

[34] E. Vogel-Polsky, "Les actions positives dans la théorie juridique contemporaine", in B. De Grave, (ed.), Positieve actie, positieve discriminatie, voorrangsbehandeling voor vrouwen, Tegenspraak-Cahier 8, Antwerpen, Kluwer, 1990, p. 79.

[35] Committee on the Elimination of Discrimination against Women, General Recommendation No. 23, Political and public life, para. 15, in HRI/GEN/1/Rev.4(2000).

[36] Non-discrimination and equality constitute nowadays basic and essential principles relating to the protection of human rights. Consequently, they have also become principles of customary international law. Extensive support for this view is to found in various authoritative international instruments proclaiming the principle of non-discrimination, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the UNESCO Declaration on Race and Racial Prejudice, etc. Furthermore, authoritative legal institutions, such as the International Law Commission and the International Court of Justice, have made declarations in that sense. See, for example, the statements of the ICJ in its Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970), in the Barcelona Traction case (1970), and in its Advisory Opinion on

Namibia (1971). The view is also supported by State practice and a strong opinio juris voiced at various international conferences and by authoritative experts.

[37] See United States Supreme Court Justice Blackmun's dictum: "in order to get beyond racism, we must first take race into account". Regents of the University of California v. Bakke, 438 U.S. 265, 1978.

[38] See United Nations document E/CN.4/SR.50, para. 9. For an explanation of the discussion on "distinction" and "discrimination", which reappeared later during the drafting of the International Covenants, see also J.T. Möller, "Article 7", in A. Eide, et al. (eds.), The Universal Declaration of Human Rights: A Commentary, Oslo, Scandinavian University Press, 1992, pp. 115-141.

[39] Sir Hersch Lauterpacht (An International Bill of the Rights of Man, New York, Columbia University Press, 1945, pp. 116-119) refers to section 1 of the Fourteenth Amendment of the Constitution of the United States, which states that the equal protection of the laws does not exclude distinctions between and classifications of persons so long as these are based on reasonable grounds. Early case law of the United States Supreme Court, therefore, does not forbid the segregation of blacks in schools, trains, railway stations and other public places. The Supreme Court stated that wide discretion in establishing classifications by reference to various factors is essential to and not inconsistent with the principle of true equality so long as the basis of classification is reasonable. This line of reasoning was later reformed. Lauterpacht admits that the interpretation of equality conceived as a mechanical equality of opportunity and advantage was stretched to the breaking point.

[40] On the history of this ambiguity, see M. Bossuyt, L'Interdiction de la discrimination dans le droit international des droits de l'homme, Bruxelles, Bruylant, 1976, pp. 7-27 ; N. Lerner, Group rights and discrimination in international law, Dordrecht, Martinus Nijhoff Publishers, 1991, pp. 24-28; B.G. Ramcharan, "Equality and nondiscrimination", in L. Henkin (ed.), The International Bill of Rights, New York, Columbia University Press, 1981, pp. 258-259.

[41] See United Nations document A/5365, p. 22.

[42] Human Rights Committee, General Comment No. 18, Non-discrimination, paras. 8 and 13, in HRI/GEN/1/Rev.4 (2000).

[43] European Court of Human Rights, Belgian Linguistics case, 23 June 1968, Ser. A, p. 34. The Court admitted that doing so would lead to absurd results - every legal provision which does not secure to everyone equal treatment would be contrary to article 14. This would be an untenable position, as law necessarily makes distinctions of many kinds.

[44] See for a good summary Vijapur, op. cit. at note 14, pp. 73-74. MacKean, op. cit at note 24, pp. 94-96. For example, in 1949, the Secretary-General stated in his memorandum on the main types and causes of discrimination that discrimination is a detrimental distinction based on grounds which may not be attributed to the individual and which have no justified consequences. See United Nations document E/CN.4/Sub.2/40.

[45] Bossuyt, op. cit. at note 7, p. 27. MacKean, ibid., pp. 8-11.

[46] This is consistent with the international definitions on discrimination. "Discrimination" was not defined in the Universal Declaration or in the two International Covenants. The first definition of discrimination is to be found in the International Convention on the Elimination of All Forms of Racial Discrimination which provides that the term "racial discrimination" shall mean "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". Similarly, the Convention on the Elimination of All Forms of Discrimination against Women provides that "discrimination against women" shall mean "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

The Human Rights Committee has used these definitions of specific forms of discrimination to construct a more general definition. According to the Committee discrimination should be understood to imply "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms". General Comment No. 18, para. 7.

Other definitions are to be found in the ILO Convention concerning Discrimination in Respect of Employment and Occupation, 1958 (No. 111), which states: "For the purpose of this Convention the term discrimination includes - (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation ...". The UNESCO Convention against Discrimination in Education (1960) asserts: "For the purpose of this Convention, the term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education ...".

[47] See C. Tomuschat, "Equality and Non-Discrimination under the CCPR", in I. Von Munch, Festschrift für Hans-Jürgen Schlochauer, Berlin, Walter de Gruyter, 1981, pp. 712-716.

[48] Dissenting Opinion of Judge Tanaka, South West Africa cases, (2nd phase), ICJ Report 1966, pp. 284-316. Judge Tanaka keenly observed that the principle of equality requires that those who are equal be treated in an equal manner, and those who are different be treated differently. However, he asserted, the principle of equality does not mean absolute equality, but recognizes relative equality, namely different treatment proportionate to concrete individual circumstances. Although people have certain common characteristics, they nevertheless possess independent

attributes and qualities, which may legitimately be taken into account in the distribution of social goods. The fundamental questions, however, remain: When can people be said to be equal or different, and which considerations may form legitimate justifications for differential treatment?

[49] European Court of Human Rights, op. cit. at note 43; M. Bossuyt, "Het discriminatieverbod van de Europese Conventie van de Rechten van de Mens in de Rechtspraak van de Commissie na het Belgisch taalarrest", Revue belge de droit international, 1972, pp. 503-528.

[50] The European Court's analysis of non-discrimination has been quoted with approval by the Inter-American Court of Human Rights in its Advisory Opinion oc-4/84, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica of 19 January 1984, para. 57: "There would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind".

[51] See also, T. Opsahl, "Equality in Human Rights Law, with special reference to article 26 of the ICCPR", in M. Nowak, (ed.), Kehl, N.P. Engel Verlag, 1988, pp. 51-65. Case law: S.W.M. Broeks v. Netherlands, Communication No. 172/1984, Zwaan-de Vries v. Netherlands, Communication No. 182, 1984 Official Records of the General Assembly Forty-second session, supplement No. 48 (A/42/40), annex VIII, sects. B and D: because article 26 lays down a general principle of non-discrimination, the full range of this non-discrimination signifies that the Committee has competence to review any differential treatment, even in the field of economic, social and cultural rights, in order to determine if it amounts to discrimination.

[52] Bossuyt, op. cit. at note 7, p. 262; M. Bossuyt, "The principle of equality in article 26 of the International Covenant on Civil and Political Rights", in A. De Mestral (ed.), The Limitation of Human Rights in Comparative Constitutional Law, Cowansville, Éditions Yvon Blais, 1986, pp. 283-284; E.W. Vierdag, The Concept of Discrimination in International Law with Special Reference to Human Rights, The Hague, Martinus Nijhoff, 1973, p. 176.

[53] Lord Denning: "So here if this education authority were to allocate boys to particular schools according to the colour of their hair or, for that matter, the colour of their skin, it would be so unreasonable, so capricious, so irrelevant to any proper system of education that it would be ultra vires altogether and this Court would strike it down at once. But, if there were valid educational reasons for a policy, as, for instance in an area where immigrant children were backward in the English tongue and needed special teaching, then it would be perfectly right to allocate those in need to special schools where they would be given extra facilities for learning English". As quoted by MacKean, op. cit. at note 24, p. 246.

[54] Tomuschat, op. cit. at note 47, pp. 715-716, and Thornberry, op. cit. at note 13, pp. 281-286, refer to the travaux préparatoires of the International Covenants and the discussion on time limitation for affirmative action.

[55] See also articles 1, paragraph 4, ICERD and 4, paragraph 1, Woman's Convention. The Committee on the Elimination on Racial Discrimination, during the discussion on the fourth periodic report of Fiji, pointed out that the special treatment accorded to certain racial groups did not appear to have a specified limited duration; in order to satisfy the Convention, a more categorical undertaking should have been given that the unequal rights of different racial groups would not be maintained after the objectives for which they were intended had been achieved. Official Records of the General Assembly, thirty-seventh session, supplement No. 18 (A/37/18), para. 101.

[56] Although the "separate but equal" doctrine appeared to violate the Fourteenth Amendment of the United States Constitution, the Supreme Court did not see it that way in 1896 when viewing the case Plessy v. Ferguson (163 U.S. 537, 1896). It involved a man who had been arrested for violating a Louisiana law that required railroads to provide "equal but separate accommodations" for "white and coloured" passengers. Half a century later, the doctrine was challenged in the case Brown v. Board of Education (347 U.S. 483, 1954) and the Supreme Court ruled that separate schools created a feeling of inferiority for Black students and for that reason violated the Fourteenth Amendment.

[57] See Thornberry, op. cit. at note 13, pp. 25-54, which deals extensively with the historical background.

[58] After the Congress of Vienna, treaty clauses for protection of minorities became more detailed and there was a shift away from the protection of religious groups to the protection of national minorities.

[59] P. de Azcárate, League of Nations and National Minorities: an experiment, Washington, Carnegie Endowment for International Peace, 1945, p. 216; McKean, op.cit. at note 24, pp. 14-45.

[60] Minority Schools in Albania, Advisory Opinion, PCIJ, 1935, Ser A/B No. 64, 19.

[61] This double-track system found its inspiration in the Advisory Opinion of the PCIJ on the Minority Schools in Albania, ibid. See United Nations documents E/CN.4/Sub.2/36 and E/CN.4/Sub.2/SR. 14 and 15.

[62] Op. cit. at note 44.

[63] Ibid.

[64] A. Eide, Protection of minorities: possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities, (E/CN.4/Sub.2/1993/34, para. 172.

[65] In its General Comment No. 18 on the non-discrimination principle, the Human Rights Committee stated that affirmative action, i.e. special measures, may be taken only for as long it is needed to correct discrimination in fact. On the other hand, in paragraphs 6.1 and 6.2 of its General Comment No. 23 on article 27, the minorities article, it admits that although the rights

protected under article 27 are formulated in negativity terms positive measures by States may also be necessary to protect the identity of a minority and so long as they are only aimed at providing protection, they may constitute a legitimate differentiation under the Covenant. Here, no time limit is imposed. Notice also the different word use. This distinction is also made in State practice, for example, India has a different protection system for minorities, whose rights have an element of permanence, and for the Scheduled Castes and Scheduled Tribes, whose special rights are envisaged as temporary and exceptional measures to reduce the inequalities between communities.

[66] A.S. Akermark, Justifications of Minority Protection in International Law, London, Kluwer Law International, 1997, pp. 23-28.

Annex

## QUESTIONNAIRE ON AFFIRMATIVE ACTION

1. What are the principal constitutional and legislative provisions relating to the principle of equality and the prohibition of discrimination? Please provide copies of the relevant provisions.

2. Provide landmark judgements relating to the principle of equality and the prohibition of discrimination.

3. Are there any provisions of a constitutional, legislative or executive nature referring to the concept of "affirmative action" and/or of so-called "positive" or "reverse" discrimination? If so, please provide copies of the relevant provisions.

4. What is, according to those provisions or to national case law, the relationship between the prohibition of discrimination and the concept of affirmative action?

5. Provide examples of national affirmative action schemes implemented pursuant to those provisions.

6. What groups are targeted by those affirmative action schemes (gender, racial groups, specific minorities, indigenous peoples, migrants, disabled persons, veterans, etc.)?

7. To what fields do those affirmative action schemes apply (education, employment, housing, transportation, ballot box, training, appointments to political, executive or judicial posts, awarding contracts or scholarships, others)?

8. What is the historical context in which those affirmative action schemes have been adopted?

9. What are the objectives stated in relation to those affirmative action schemes?

10. Are there any limits set to those affirmative action schemes and how will it be determined whether and when the objectives of those affirmative action schemes will be achieved?

11. Do the affirmative action schemes apply equally to all groups or are any distinctions made in favour of one or more specific groups over others? How are those specific groups defined?

12. Is there any national case law relating to those affirmative action schemes? If so, please provide copies of the principal judgements.

13. Are there any specific bodies, authorities, commissions, tribunals or courts competent to hear complaints in relation to the implementation and operation of affirmative action schemes?

14. Who is entitled to lodge complaints and start proceedings before such organs?

15. Provide, if available, statistics indicating the success of affirmative action schemes and particularly the progress made since their introduction.

Note. In the case where affirmative action schemes relating to different groups have been adopted, the answers should be given for each group specifically.

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# COMPREHENSIVE EXAMINATION OF THEMATIC ISSUES RELATING TO RACIAL DISCRIMINATION

## The concept and practice of affirmative action

Preliminary report submitted by Mr. Marc Bossuyt, Special Rapporteur,
in accordance with Sub-Commission resolution 1998/5

## Corrigendum

Contents and page 12, heading

For non-discrimination read discrimination

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